MISSISSIPPI LAW JOURNAL

ARTICLE

THE ORIGINS OF THE MISSISSIPPI LAW JOURNAL
Michael de L. Landon

1978 MISSISSIPPI SUPREME COURT REVIEW

VOLUME 50 MARCH 1979 NUMBER 1

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THE ORIGINS OF THE MISSISSIPPI LAW JOURNAL

*Michael de L. Landon**

In October, 1928, volume one, number one, of the Mississippi Law Journal was run-off on the printing presses of the McCowat-Mercer printing house in Jackson, Tennessee, and mailed out to its more than one hundred initial subscribers. The title page of the new periodical bore the date July, 1928,[1] and carried the names of its board of student editors at the University of Mississippi Law School. The chief editor was Dugas Shands of Cleveland and the note editor was John C. Satterfield of Port Gibson who would later serve both as president of the Mississippi State Bar (1955-56) and as president of the American Bar Association (1961-62).[2] Also listed were the names of an "advisory committee" of members of the bar. Chaired by Dean T.C. Kimbrough of the Law School, it included Judge W.C. Sweat of Corinth, Robert H. Powell of Canton, M.S. Connor of Seminary who three years later would be elected governor of the state, George W. Currie of Hattiesburg who was president of the Mississippi Bar Association that year, and the Bar Association's secretary-treasurer Louis M. Jiggitts of Jackson. The publication was subtitled the "Journal of the State Bar Association," and its contents consisted of the proceedings of the Association's twenty-third annual meeting held the previous spring at Gulfport. Probably the most significant decision taken at the meeting had been to underwrite the publishing of a journal for Mississippi lawyers.

The idea of doing so was one that had been around for a long time. Sixteen years earlier, at the State Bar Association's seventh annual meeting, held in Jackson in May, 1912, a resolution had been passed calling on the group's president to appoint a board

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* Professor of History, University of Mississippi. B.A., 1958; M.A. 1961, Oxford University; Ph.D., University of Wisconsin, 1966.

[1] A new story in the Mississippian announced that the first issue would be printed in mid-October. Mississippian, Sept. 29, 1929, at 1, col. 1.

[2] Charles S. Sykes served as case editor, H. Edwin White as business manager and George H. Hill, Jr., as assistant business manager. The assistant editors were Alex J. Brunini, F.W. Cunningham, E.P. Jones, Jr., W.R. Newman, Jr., E.L. Shelton, C.H. Westbrook and W.H. Anderson. *Id.* at 8, col. 3.

of five directors to plan the publication of "a Magazine to be devoted to the interests of this association and to the lawyers of Mississippi."[3] Moved by R.N. Miller of Hazlehurst, the resolution had called for those appointed as directors to arrange for the magazine to be published on a monthly basis in Jackson. Further resolutions stipulated that they were to hire a chief editor and to invite the deans of the state's two law schools, at the University of Mississippi and at Millsaps College,[4] to serve as honorary, associate or contributing editors. But control of the periodical's general policies, including the setting of subscription rates and determining the amounts charged for advertising, was to remain vested in the directors. All the Association's members were urged to subscribe and to encourage their fellow lawyers to send in subscriptions also. To get the magazine off to a good start a final resolution authorized the setting aside of one thousand dollars of the Association's funds to cover the initial publishing expenses; but with the proviso that if that full amount were ever expended publication would have to cease.

Apart from that one restriction, the final decision concerning the feasibility of publishing the magazine was left up to the directors. A year later, in 1913 in Greenwood, R.H. Thompson of Jackson gave the annual meeting a very discouraging report as to their findings. A survey had shown that very few of the state's lawyers were prepared to commit themselves in advance to subscribe to it; and potential advertisers had manifested little interest in paying for space in a professional journal with a very limited circulation. Although only one hundred dollars out of the thousand allocated had as yet been spent, he and his fellow directors had decided to recommend that the idea of the magazine be dropped. After considerable discussion a majority of the members present finally, though regretfully, agreed.[5]

Nine more years elapsed; and then, at the 1922 annual meeting in Vicksburg, the members of the Bar Association agreed at the request of Dean Kimbrough to hear a proposal from a Univer-

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[3] MISSISSIPPI STATE BAR ASSOCIATION, 1912 PROCEEDINGS at 9.

[4] The law curriculum established at Millsaps in 1896 was terminated in 1918 because most of the students enrolled in it had left to join the armed forces. *See* II R. MCLEMORE, A HISTORY OF MISSISSIPPI 381 (1st ed. 1973).

[5] MISSISSIPPI STATE BAR ASSOCIATION, 1913 PROCEEDINGS at 6, 10, 24-25.

sity of Mississippi Law School student, John Edward McCall.[6] The first law student ever to be invited to address the Association, he told them that he and his seventy or so fellow students, "including three girls," were interested in establishing, under the auspices of their honor society, the Blackstone Club, a "Mississippi Law Review" patterned after the law reviews published by Harvard and other prestigious law schools in the East. Their plan was for it to be edited and published by a "Board of Control" made up of three Blackstone Club members and three other law students. He was there to ask for the Association's help in getting the project launched. Specifically it was hoped that every member would be willing to take out a two-dollar subscription, and that many of them would be interested in submitting articles for publication. Letters soliciting support, he told them, would be mailed to every lawyer in the state early the following autumn.

By early October, in fact, chief editor Joseph M. Howorth of Cleveland was able to tell a Blackstone Club meeting that one hundred and forty subscriptions to the planned review had already been received, and that three hundred and thirteen dollars worth of advertising space had been sold to firms such as the West Publishing Company of Minneapolis. In addition to the Bar Association, the justices of the Mississippi Supreme Court and the Law School faculty had all expressed their approval of its publication. The student weekly newspaper, the *Mississippian,* quoted Dean Kimbrough as saying: "I have carefully gone over the proposed plan . . . for the publication of a periodical to be known as the Mississippi Law Review, and most heartily approve the same."[7] The Review would contain "notes on Recent Decisions, critical book reviews, news of the Mississippi Bar Association, and other articles of interest contributed by leading lawyers of the state," Howorth told the *Mississippian.*[8]

Howorth had been elected business manager of the proposed

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[6] *Id.*, 1922 PROCEEDINGS at 168. The proceedings identify the student as "McGill"; however, the Ole Miss Annual for 1922 lists no law student McGill, and Mrs. Lucy Somerville Howorth told the author by telephone (January 31, 1979) that she believed it must have been McCall.

[7] Mississippian, Oct. 6, 1922, at 1, col. 2. Advertisements for the *Law Review* appeared in the Mississippian on Oct. 13, at 3, col. 1, and Oct. 20, at 3, col. 1.

[8] *Id.*, Oct. 6, 1922, at 3, col. 5.

Review at the Blackstone Club meeting the previous spring by a narrow margin over Levi M. Pettis of College Hill in a hotly contested election. At the same meeting Addie M. McCain, vice-president of the first year law class, had been elected chief editor by acclamation. Miss McCain had not returned to school that fall, however, so Howorth had been elected to serve as editor in her place and Pettis had been elected business manager. Associate editors were L.C. Corban, A.H. Bell, J.C. Hathorn, F.B. Jackson, D.R. Stump, and a future dean of the Law School, R.J. Farley.[9]

Although it was not published as frequently as "monthly November to June," as its founders had intended, the *Mississippi Law Review* flourished for a period of almost two years. Thanks to the good offices of Louis M. Jiggitts, who had returned to the law school to finish his degree after two years at Oxford University on a Rhodes Scholarship, one of its earliest contributors was Oxford's Vinerian Professor of English Law, W.S. Holdsworth, the most distinguished legal scholar of that day.[10] In May, 1923, L.C. Corban succeeded Howorth as chief editor and D.R. Stump became business manager for 1923-24.[11] In 1924 the *Mississippi Law Review* was reportedly a factor in gaining for the Law School accreditation with an "A" rating by the prestigious American Association of Law Schools. But in the spring of that same year, the state legislature voted to give the colleges and universities a considerably smaller appropriation than they had been receiving. Forced to economize, the Law School faculty decided to cease subsidizing the *Review* which, therefore, ceased publication.[12]

Four more years elapsed before the members of the State Bar Association, meeting in Gulfport in 1928, were told by their president, R.E. Wilbourn, that he considered it "highly desirable" that the Association publish some sort of periodical through which it could "more easily enlist and retain the interest of its individual membership."[13] Louis M. Jiggitts, who had recently

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[9] MISSISSIPPI STATE BAR ASSOCIATION, 1922 PROCEEDINGS at 169.

[10] Telephone conversations with Mr. Joseph M. Howorth and Lucy Somerville Howorth of Cleveland, Miss., Jan. 31, 1979.

[11] Mississippian, May 18, 1923, at 1, col. 2.

[12] Telephone conversations, *supra* note 10. Unfortunately, the University of Mississippi Law Library does not at present have any of the copies of the *Mississippi Law Review,* but steps are being taken to obtain them.

[13] 1 Miss. L.J. 14, 49 (1929).

been appointed secretary-treasurer of the Association, had come up with the suggestion that Mississippi follow the example of Minnesota where the *Minnesota Law Review* was published monthly on a joint basis by the state bar and the state university law school.[14] Mississippi, it was proposed, should publish a quarterly "law review and journal" on the same basis.[15] The first number of each annual volume, published in the summer, would contain the proceedings of the Bar Association's meeting held the previous spring.[16] More than $300, Wilbourn reminded them, had been spent on printing the 1927 proceedings. That amount contributed each year, when combined with a small income from subscriptions and advertising, would be enough to pay for the new publication. To ensure that the money was well-spent, a board of directors, consisting of Dean Kimbrough and the Bar Association's officers, would oversee the work of the law student staff who would do the actual editing and publishing.[17] Before adjourning on May 3, on a motion by J.M. Thomas of Tupelo seconded by Gabe Jacobson of Meridian, the members voted their approval of the plan.[18]

Nearly five months later, at the end of September, 1928, editor Shands announced on the University of Mississippi campus that the first issue of the *Mississippi Law Journal,* the "July" issue, would be "placed in the hands of the printer on October 3."[19] Subscriptions had been coming in steadily to the publication, which was intended to "reflect the activities of the legal profession in Mississippi and to some extent over the nation," Shands said.[20] One of its most important functions would be to publish Mississippi annotations to the American Law Institute's "Restatements" of the law.[21]

The second issue of Volume I, bearing the date "October," in fact contained annotations to the Restatement of Torts compiled by Chief Justice Sydney Smith of the state supreme court.[22]

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 107-11.
[18] *Id.* at 110-11.
[19] Mississippian, Sept. 29, 1928, at 1, col. 1.
[20] *Id.*
[21] *Id.*
[22] 1 Miss. L.J. 236, 236-67 (1928).

The anticipated four issues were eventually published that first year, totalling 468 pages. At their 1929 annual meeting in Clarksdale, the Bar Association members were told that one hundred and forty of their members had taken out subscriptions and so had forty-six other Mississippi lawyers.[23] All of the law students at the University had subscribed, and subscriptions had come in from eighty-six American law libraries and about a dozen libraries and individuals overseas.[24] The Bar Association had contributed $491.85 to the cost of publishing the first volume.[25] At Jiggitts' suggestion, and on the understanding that every member would receive free copies, a resolution was passed to contribute $800 towards publishing Volume II.[26]

Volume II was the first to include book reviews and was 492 pages in length. The *Mississippi Law Journal* appeared to be securely established as an institution. But at their 1930 meeting in Biloxi the Bar Association, whose membership had fallen in one year from over five hundred to under three hundred, "by reason of the recent depression," cut their subsidy to the *Journal* back to $400.[27] Volume III (1930-31) therefore contained a total of only 398 pages. And matters grew worse; Volume IV (1931-32) consisted of only three issues and contained only 225 pages. To many it must have seemed probable that the *Law Journal,* like its predecessor the *Law Review,* would die an early death because of inadequate funding. What saved it was the Unified Bar Act passed by the state legislature in 1932[28] which, by requiring every one of the nearly 1300 lawyers in the state to become dues-paying members of what was now to be called the Mississippi State Bar, rescued both the organized bar and the *Law Journal* from possible extinction.

At the first annual meeting of the unified bar, held in Jackson in September, 1932, the members approved an allocation of $1,200 to subsidize Volume V of the *Mississippi Law Journal.*[29]

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[23] 2 MISS. L.J. 15, 39-40 (1929).

[24] *Id.* at 40.

[25] *Id.* at 41.

[26] *Id.*

[27] 3 MISS. L.J. 4, 65 (1930). An audited income statement prepared for the fiscal period 1929-30 showed that the *Journal* suffered a loss of $59.98. *Id.* at 45.

[28] 1932 Miss. Laws ch. 121.

[29] 5 MISS. L.J. 2, 61 (1932).

Thus the *Journal* was enabled to continue to fulfill the hope expressed by Dean Kimbrough in the preface that he wrote to Volume I, number one, that it become "a permanently established periodical that will render through the years a most distinct and helpful service to the judiciary, the bar, and the law students of the state."[30]

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[30] 1 Miss. L.J. iv, v. (1928).

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1978 MISSISSIPPI SUPREME COURT REVIEW

Administrative Law

I. Workmen's Compensation

During 1978, the Mississippi Supreme Court handed down eight decisions[1] dealing with a variety of workmen's compensation issues ranging from compensable injuries[2] and statutory construction[3] to burden of proof[4] and scope of review.[5] Other issues resolved by the court included the scope of employment under the

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[1] Georgia-Pacific Corp. v. Thompson, 365 So. 2d 62 (Miss. 1978); McCluskey v. Thompson, 363 So. 2d 256 (Miss. 1978); Thompson v. Wells-Lamont Corp., 362 So. 2d 638 (Miss. 1978); Singer Co. v. Smith, 362 So. 2d 590 (Miss. 1978); Pepsi-Cola Bottling Co. v. Long, 362 So. 2d 182 (Miss. 1978); Richey v. City of Tupelo, 361 So. 2d 995 (Miss. 1978); King & Heath Constr. Co. v. Hester, 360 So. 2d 692 (Miss. 1978); Charles N. Clark Assocs. v. Robinson, 357 So. 2d 924 (Miss. 1978).

[2] *See* Pepsi-Cola Bottling Co. v. Long, 362 So. 2d 182, 184-85 (Miss. 1978)(although an injury may be diagnosed initially as only minor and thus be noncompensable, the condition may worsen or deteriorate over a period of time and thus become a latent compensable injury); Charles N. Clark Assocs. v. Robinson, 357 So. 2d 924, 929 (Miss. 1978)(where employee suffers from condition not caused by work but aggravated thereby condition is compensable).

[3] *See* McCluskey v. Thompson, 363 So. 2d 256, 259, 264 (Miss. 1978) (workmen's compensation statutes should be sensibly but liberally construed with a view to carrying out the purposes of the act); Thompson v. Wells-Lamont Corp., 362 So. 2d 638, 641 (Miss. 1978)(workmen's compensation statutes must be liberally but fairly construed to ensure that the beneficent purposes intended by the legislature are carried out); Charles N. Clark Assocs. v. Robinson, 357 So. 2d 924, 928 (Miss. 1978)(workmen's compensation law should be broadly and liberally construed).

[4] *See* Thompson v. Wells-Lamont Corp., 362 So. 2d 638, 641 (Miss. 1978)(once prima facie case of disability has been made, burden of proof shifts to employer to produce evidence concerning availability of suitable employment to refute claimant's evidence to the contrary).

[5] *See* Georgia-Pacific Corp. v. Thompson, 365 So. 2d 62, 62-63 (Miss. 1978)(where a finding of the Workmen's Compensation Commission is reversed by the circuit court but is supported by substantial evidence, the circuit court will be reversed and the administrative determination reinstated); Singer Co. v. Smith, 362 So. 2d 590, 591 (Miss. 1978)(findings of Workmen's Compensation Commission that are supported by substantial evidence will be affirmed); King & Heath Constr. Co. v. Hester, 360 So. 2d 692, 694 (Miss. 1978)(neither circuit court nor supreme court will disturb findings of fact of Workmen's Compensation Commission if supported by substantial evidence; however, the court may check any fundamentally improper exercise of administrative authority); Charles N. Clark Assocs. v. Robinson, 357 So. 2d 924, 928 (Miss. 1978)(order of Workmen's Compensation Commission supported by substantial evidence must be affirmed because appellate courts do not judge the weight and worth of such evidence).

Workmen's Compensation Act,[6] application of the "last injurious exposure" rule,[7] the effect of latent compensable injuries on the statute of limitations,[8] the point at which employers' liability attaches in latent compensable injuries cases,[9] extent of disability[10] and limitation of an injured employee's action in tort against his co-workers where the injured had been compensated under the Act.[11] The last mentioned issue was explored by the court in *McCluskey v. Thompson*,[12] perhaps the most notable of the court's workmen's compensation decisions in 1978.

In *McCluskey*, the supreme court explored the scope of the remedy available under the Workmen's Compensation Act.[13] McCluskey was killed in a work-related accident. His widow received workmen's compensation benefits from his employer, Bechtel Power Corporation, and from Travelers Insurance Company. Subsequently, Mrs. McCluskey brought suit against A.J. Thompson and other co-employees of her husband alleging that their negligence wrongfully caused McCluskey's death. Mrs. McCluskey's declaration also named Bechtel and Travelers as defendants and sought to have them assert any claims "they may have in the premises." Thompson's demurrer to the declaration was sustained on the ground that the Workmen's Compensation

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[6] *See* Charles N. Clark Assocs. v. Robinson, 357 So. 2d 924, 929 (Miss. 1978)(where employee visiting physician upon suggestion of employer for treatment of a condition not caused by but aggravated by work was killed en route, there existed a causal connection between employment and death sufficient to entitle employee's beneficiaries to compensation under the Act).

[7] *See* Singer Co. v. Smith, 362 So. 2d 590, 593 (Miss. 1978) (rule has no application where it is clear that injury or disease and resulting disability manifested itself before change of ownership and degree of injury did not worsen from time of prior ownership to that of new one).

[8] *See* Pepsi-Cola Bottling Co. v. Long, 362 So. 2d 182, 184-85 (Miss. 1978) (where compensable injury or condition is latent, the two-year statute of limitations does not begin to run until such injury or condition is discovered or discoverable by use of reasonable care and diligence).

[9] *See* Singer Co. v. Smith, 362 So. 2d 590, 593 (Miss. 1978)(although condition may be latent and go undetected for a period of time, employer's liability attaches from the time of the accident).

[10] *See* Richey v. City of Tupelo, 361 So. 2d 995, 997-98 (Miss. 1978) (where medical testimony establishes the extent of disability).

[11] *See* McCluskey v. Thompson, 363 So. 2d 256, 259 (Miss. 1978)(deceased employee's spouse could not sue negligent fellow employee of deceased where the death was covered by the Act).

[12] 363 So. 2d 256 (Miss. 1978).

[13] MISS. CODE ANN. §§ 71-3-1 to -111 (1972 & Supp. 1978).

Act was the exclusive remedy of injured employees. Bechtel and Travelers also demurred, alleging that Mississippi Code section 71-3-9[14] precluded suit against them. They further asked that any dismissal be without prejudice to their rights to intervene later under section 71-3-71.[15] The trial court overruled the demurrer and, noting that no time limit was established for the exercise of the right to intervene under section 71-3-71, ordered Bechtel and Travelers to intervene within thirty days or forfeit all rights to challenge any judgment awarded to Mrs. McCluskey. Mrs. McCluskey appealed from the trial court's sustaining of Thompson's demurrer.

Ten years earlier, the Mississippi Supreme Court had decided that where an employee covered by workmen's compensation was injured through the negligence of a fellow employee, the injured employee could not maintain an action grounded in negligence against his co-worker; rather, his exclusive remedy was held to be under the Workmen's Compensation Act.[16] Reaffirming that rule in *McCluskey*, the court took the opportunity to set forth the rationale supporting the two decisions.

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[14] *Id.* § 71-3-9 (1972) provides:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

[15] The relevant portion of *id.* § 71-3-71 (1972) provides:

> The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee shall not affect the right of the employee or his dependents to sue any other party at law for such injury or death, but the employer or his insurer shall be entitled to reasonable notice and opportunity to join in any such action or may intervene therein. If such employer or insurer join in such action, they shall be entitled to repayment of the amount paid by them as compensation and medical expenses from the net proceeds of such action (after deducting the reasonable costs of collection) as hereinafter provided.

[16] Stubbs v. Green Bros. Gravel Co., Inc., 206 So. 2d 323, 324-25 (Miss. 1968)(where plaintiff was injured through the negligence of a fellow employee, Workmen's Compensation Act was plaintiff's exclusive remedy).

The Workmen's Compensation Act[17] was created to compensate and rehabilitate victims of industrial accidents.[18] The Act in effect instituted a no-fault system of compensation under which the employee is assured an award without having to prove liability on the employer's part.[19] In return for this right to automatic compensation, the employee surrendered his common law right to sue his employer in tort.[20] Mississippi's Workmen's Compensation Act specifically precludes suit against the employer by an employee who has been compensated.[21]

The question in *McCluskey* was whether the employer's immunity to suit extended to the injured worker's fellow servants. The Workmen's Compensation Act states that the acceptance of compensation benefits shall not affect the employee's rights against any party other than the employer and the employer's compensation insurer. Mrs. McCluskey argued that since Mississippi's Workmen's Compensation Act was in derogation of the common law, it must be strictly construed. She contended that since a strict construction of the statute prohibits only suits against the employer and the insurer, she should be allowed to prosecute her suit against Thompson.

Workmen's compensation acts are by no means uniform from state to state. In jurisdictions where suits against third parties are allowed, the courts are divided upon the issue of who is and who is not a "third party" within the meaning of the statute.[22] While some jurisdictions treat fellow employees as "third persons" susceptible to suit,[23] others extend the employer's immunity under

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[17] MISS. CODE ANN. §§ 71-3-1 to -111 (1972 & Supp. 1978).

[18] 1948 Miss. Laws, ch. 354, p. 507.

[19] *See* McCluskey v. Thompson, 363 So. 2d at 259.

[20] *Id.*

[21] MISS. CODE ANN. § 71-3-9 (1972). See note 14 *supra*.

[22] MISS. CODE ANN. § 71-3-71 (1972). See note 15 *supra*.

[23] *See, e.g.*, Neal v. Oliver, 246 Ark. 377, 438 S.W.2d 313, 317 (1969) (co-employee may be liable as a third-party tortfeasor within the meaning of the workmen's compensation statute); Singleton v. Bonnesen, 131 Cal. App. 2d 327, 280 P.2d 481, 482 (1955)(no rule prohibits a suit against co-employee for negligence even though their common employer is insulated from such suit by the statute); Frantz v. McBee Co., 77 So. 2d 796, 800 (Fla. 1955)(co-employee is a third-party tortfeasor within the meaning of the Florida statute).

It should be noted that the California act construed in *Singleton* has since been amended specifically to exempt fellow servants from suit where the injured employee is covered by workmen's compensation. *See* Saala v. McFarland, 63 Cal. 2d 124, 403 P.2d 400, 402, 45 Cal. Rptr. 144, 146 (1965)(construing CAL. LAB. CODE § 3601 (West)).

the statute to the claimant's co-employees.[24]

In *McCluskey*, the court first noted that Mississippi's Workmen's Compensation Act was purposely designed to place the burden of compensating injured employees on the employer since (1) industrial injuries arise from the fact of employment, and (2) the employer can pass the cost of compensating the injuries to the consuming public.[25] If the injured employee were allowed to recover damages from his negligent fellow worker, the burden of compensation would be shifted from the industry to the employees, thereby defeating the purpose of the Act.[26] The court reviewed the rules of statutory construction and reaffirmed its position that the Workmen's Compensation Act must be construed sensibly and liberally,[27] and that the legislative intent must be determined by examining the statutory language as a whole rather than by taking a given segment of the law out of context.[28] Looking to a pair of foreign decisions for guidance,[29] the court determined that the legislature never intended for fellow employees to assume the burden of compensation that it had rightfully

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[24] *See, e.g.*, Saala v. McFarland, 63 Cal. 2d 124, 403 P.2d 400, 402, 45 Cal. Rptr. 144, 146 (1965); Jackson v. Hutchinson, 453 S.W.2d 269, 270 (Ky. 1970)(injured worker's right of action against "some other person" than his employer does not include his fellow servants; rather, employer's immunity necessarily extends to his employees); Saharceski v. Marcure, 366 N.E.2d 1245, 1246 (Mass. 1977)(employee injured in the course of his employment by the negligence of a co-worker may not recover from that co-worker if he too was acting in the course of his employment); Sturkie v. Bottoms, 203 Tenn. 237, 310 S.W.2d 451, 452 (1958)(employee negligently injuring a co-worker while acting in scope of his employment is not a "third person" subject to suit by employee entitled to workmen's compensation).

[25] McCluskey v. Thompson, 363 So. 2d at 259.

[26] *Id.*

[27] *Id.* (citing Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 682, 52 So. 2d 634, 638 (1951)(the Act is to be liberally construed)); Lucedale Veneer Co. v. Rogers, 211 Miss. 613, 622, 48 So. 2d 148, 150 (1950), *suggestion of error overruled*, 211 Miss. 613, 53 So. 2d 69 (1951)(construction must be sensible as well as liberal).

[28] McCluskey v. Thompson, 363 So. 2d at 259 (citing Brady v. John Hancock Mut. Life Ins. Co., 342 So. 2d 295, 298 (Miss.)(legislative intent must be determined from the total language of the statute), *appeal dismissed*, 434 U.S. 804 (1977)); Mississippi Pub. Serv. Comm. v. City of Jackson, 328 So. 2d 656, 658 (Miss. 1976)(all parts of statute are to be given effect if possible); McCaffrey's Food Mkt., Inc. v. Mississippi Milk Comm'n, 227 So. 2d 459, 463 (Miss. 1969)(courts must ascertain legislative intent from the statute as a whole).

[29] Madison v. Pierce, 156 Mont. 209, 478 P.2d 860, 864 (1970)(to allow an injured employee to collect compensation from his employer and additionally to sue a negligent co-worker for the same injury would destroy the purpose of the Act); Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6, 9-10 (1952)(same).

placed upon the employer.[30] Consequently, the court ruled that the Act should be construed to bar a suit by an injured employee against his fellow servant.[31]

McCluskey argued, however, that since the Act was in derogation of the common law in abolishing the employee's right to sue his employer for negligence, it must be strictly construed so as to permit any common law suit not expressly prohibited by the statute.[32] The court rejected the traditional notion that a statute in derogation of the common law must be strictly interpreted, attacking the doctrine for its improper relegation of statutes to a secondary status.[33] Throughout the history of Mississippi, the court observed, statutes in derogation of the common law have been accepted by the state's courts as "rules to be applied and as . . . principles from which to reason."[34] Since the Workmen's Compensation Act, as interpreted by the court, cannot coexist with the common law right of a worker to sue a fellow employee, the court ruled, the common law must give way.[35]

In its resolution of *McCluskey*, the Mississippi Supreme Court took proper cognizance of the fact that the Workmen's Compensation Act was intended to place responsibility for industrial accidents on industry rather than on employees. It is consistent with both the letter and the spirit of the Act that an injured employee compensated under the Act not be allowed to sue his fellow employee for negligence.

II. Judicial Review of Agency Decisions

In *Charter Medical Corp. v. Mississippi Health Planning and Development Agency*,[36] Charter Medical Corporation had applied to the Mississippi Health Planning and Development Agency and the State Health Coordinating Council for a certificate of need to the United States Department of Health, Education and Welfare that would enable Charter to receive federal funds to purchase

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[30] McCluskey v. Thompson, 363 So. 2d at 259.

[31] *Id.*

[32] *Id.* at 261.

[33] *Id.* at 261-62 (citing 3 R. Pound, Jurisprudence § 111, at 663-65 (1959)).

[34] McCluskey v. Thompson, 363 So. 2d at 264.

[35] *Id.*

[36] 362 So. 2d 180 (Miss. 1978).

certain radiological equipment.[37] After a hearing conducted by the State Health Coordinating Council,[38] the certificate was denied. A subsequent appeal to Hearing Officer J. Marshall Lusk, Jr., appointed by the Governor of Mississippi pursuant to the statutory scheme,[39] was unsuccessful. Charter then sought a mandatory injunction ordering the appellees to issue the certificate.[40] Arguing that the federal courts have exclusive jurisdiction to review the agency's actions, the chancellor sustained appellees' general demurrer to Charter's bill.[41] On appeal, the Mississippi Supreme Court reversed and remanded the case, holding that where no statutory appeal provision exists and there is no adequate remedy at law, the chancery court has jurisdiction to review state agency actions notwithstanding the fact that federal funds are involved.[42]

In recognizing the right of an individual to appeal an administrative decision, our court has long held that the appellate court's review should be limited to a determination of whether the decision was reasonable and proper according to the facts disclosed before the administrative board or agency.[43] Since it is not the role of the courts to enter into the functioning of the agency's decision-making, the scope of review is limited to a determina-

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[37] This application was made pursuant to the Social Security Act, 42 U.S.C. 1320a-1 (1976), and the regulations incident to the Act found at 42 C.F.R. § 100.101-.110 (1973). Under the Act and regulations, the Secretary of Health, Education and Welfare was empowered to enter into agreements with the states whereby public and non-profit private health centers and hospitals might be reimbursed by HEW for certain capital expenditures. To qualify for such reimbursement, the proposed expenditure must first have been recommended by the state's health planning agency established pursuant to 42 U.S.C. § 1320a-1 (1976). If denied a certificate, the requesting party may within thirty days request a hearing to be conducted in accordance with state law before a person or agency other than the planning agency designated by the Governor. The decision of the hearing officer, insofar as it conflicts with the planning agency's decision, supersedes the agency's ruling. 42 C.F.R. § 100.106 (1973).

[38] The State Health Coordinating Council was created by the Governor's executive order pursuant to 42 U.S.C. § 1320a-1 (1976). See note 37 *supra*.

[39] Hearing Officer Lusk was appointed by the Governor pursuant to 42 U.S.C. § 1320a-1 (1976). See note 37 *supra*.

[40] The bill of complaint was filed in the Chancery Court of the First Judicial District of Hinds County, Mississippi (cause No. 102,554).

[41] Charter Medical Corp. v. Mississippi Health Planning and Dev. Agency, 362 So. 2d 180, 181 (Miss. 1978).

[42] *Id.* at 182.

[43] *E.g.*, Board of Supervisors v. McCormick, 207 Miss. 216, 226-28, 42 So. 2d 177, 178-79 (1949).

tion of whether the order was supported by substantial evidence, was arbitrary or capricious, was beyond the power of the administrative body or violated some statutory constitutional right of the party seeking review.[44] A trial de novo, or an appellate review beyond consideration of these criteria, has been held to violate Mississippi's constitutional separation of powers.[45]

The Mississippi Supreme Court addressed the question of whether an administrative action was reviewable in the absence of a statutory provision for review in *Board of Veterinary Examiners v. Sistrunk*.[46] In *Sistrunk* the complainant veterinarian had met the statutory licensing requirements for his trade, but the examining board had nonetheless denied his license application. Although the licensing statute did not provide for an appeal, Sistrunk filed a bill of complaint asking the chancery court for a mandatory injunction ordering the examiner to issue the license. The board's general demurrer was overruled and the board appealed.[47] The supreme court affirmed, allowing review of agency action by a bill for an injunction in chancery court despite the absence of statutory authorization.[48]

In *Charter*, neither the federal statutes nor the Governor's executive order creating the appellee agencies provided for an appeal by parties denied a certificate of need.[49] The supreme court noted that *Sistrunk* had established the propriety of judi-

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[44] Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair, 222 So. 2d 664, 665 (Miss. 1969).

[45] *Id.* at 665-66 (quoting City of Meridian v. Davis, 211 Miss. 683, 692-93, 53 So. 2d 48, 52 (1951)).

[46] 218 Miss. 342, 67 So. 2d 378 (1953).

[47] *Id.* at 346, 67 So. 2d at 380.

[48] *Id.* at 347, 67 So. 2d at 380-81. The court noted that since there was no statutory provision for review and no adequate remedy at law, "a bill in chancery for a mandatory injunction is the only possible method by which appellee could obtain judicial review of the board's order" denying his license. *Id.* at 347, 67 So. 2d at 381.

> The court reviewed other possible remedies and explained why they were inadequate: An appeal by certiorari would not be adequate, since it is limited to a review of the legal sufficiency of the application and order refusing the license. An appeal by a petition for mandamus would not be sufficient, because the court could not review whether the board's action is supported by substantial evidence, but could only direct the board to act in some manner, either by granting or denying the license.

Id., 67 So. 2d at 380-81.

[49] Charter Medical Corp. v. Mississippi Health Planning and Dev. Agency, 362 So. 2d 180, 181 (Miss. 1978).

cial review of agency action without statutory authorization where no adequate remedy existed at law.[50] In *Charter*, however, the agencies involved were hybrids of state and federal cooperation. The supreme court was thus faced with an issue of first impression. Since federal funds were involved and neither state nor federal law provided for an appeal, the sole question, the court stated, was whether the lower court had jurisdiction.[51] The appellee agencies contended the involvement of federal funds precluded state court jurisdiction.[52] While not addressing this contention directly, the court cited *Sistrunk* for the proposition that judicial review was proper despite the absence of statutory authorization.[53] With only perfunctory reference to outside authority,[54] the court ruled that there was no jurisdictional conflict between the federal and state courts since the chancellor's decision on remand would be deemed binding only upon the appellees and not upon the Department of Health, Education and Welfare. It is the proper role of the state courts to consider the claims of parties alleging injury by the state boards and agencies, the court stated in reversing and remanding the case.[55]

Although the court reached the proper decision in holding that there was no jurisdictional conflict, it is unfortunate that the case received such cursory treatment. Cases factually similar to *Charter* have arisen only a few times before,[56] and never in Missis-

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[50] *Id.* at 181-82.

[51] *Id.* at 181.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 181. The court stated: "Jurisdiction was upheld by a Federal District Court involving a somewhat similar factual situation in which it was held that the controversy involved the construction of a federal statute and regulations and hence there was federal involvement." Lakeside Mercy Hosp., Inc. v. Indiana State Bd. of Health, 421 F. Supp. 193 (N.D. Ind. 1976).

The applicability of *Lakeside* to the *Charter* situation is questionable. In *Lakeside*, a state court had enjoined the Board of Health from processing any further applications for certificates of need under 42 U.S.C. § 1320a-1 (1976) until certain court proceedings were completed. In *Charter*, of course, the injunction was sought for precisely the opposite purpose.

[55] Charter Medical Corp. v. Mississippi Health Planning and Dev. Agency, 362 So. 2d at 182.

[56] The following cases are similar to *Charter* only in that they involve the same statutes and regulations. The factual situations are not the same. Lakeside Mercy Hosp., Inc. v. Indiana State Bd. of Health, 421 F. Supp. 193, 201-02 (N.D. Ind. 1976)(federal courts had jurisdiction to enjoin State Board of Health from processing applications for

sippi. The ever-increasing role of the federal government makes it inevitable that the *Charter* fact situation will become more commonplace in the future. The scant case law existing in the area in abstruse, and the Mississippi court had an opportunity to provide a clearly-reasoned precedent for other jurisdictions, but, unfortunately, chose not to do so. The court could have pointed out that the federal statutes and regulations involved seem to contemplate review by state courts.[57] It could have clarified decisions from other jurisdictions and marshalled the law into a cogent, definitive statement on judicial review of federal/state hybrid agency actions. *Charter*, however, made no such statement.

In 1978 the court also decided several cases[58] arising under Mississippi's Public School Fair Dismissal Act of 1974.[59] In its original form, the Act had as its stated purpose the establishment of "a fair dismissal procedure with notice and right of hearing and appeal for any public school superintendent, principal or teacher who is not offered a contract for reemployment for the succeeding school term."[60] Among other things, the Act required that employees receive notification within a certain time frame of any

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certificates of need pending review in state court); Bureau of Community Medical Facilities Planning v. Samson, 341 So. 2d 1071, 1074 (Fla. App. 1977)(no judicial review by state court of a denial of a certificate of need until there has been "final agency action"; implication that the state did have jurisdiction to review actions of agencies created pursuant to 42 U.S.C. § 1320a-1 (1976)); Palmetto General Hosp., Inc. v. State Dep't of Health and Rehabilitative Serv., 333 So. 2d 531, 533 (Fla. App. 1976)(exemption of hospital, for state licensing purposes, from certificate of need requirements was not controlling as to whether the Secretary of HEW would approve its request for federal funds under 42 U.S.C. § 1320a-1 (1976)).

[57] 42 C.F.R. § 100.106(c)(4) (1977) refers to judicial review of the decisions of the designated planning agencies and the hearing officers without limiting such review to federal forums: "[W]here judicial review of such decision is obtained, *the final decision of the reviewing court*, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency." *Id.* (emphasis added).

[58] Calhoun Co. Bd. of Educ. v. Hamblin, 360 So. 2d 1236, 1239 (Miss. 1978)(decision not to reemploy principal was within school board's power and did not violate statutory or constitutional rights); Lamar Co. Bd. of Educ. v. Saul, 359 So. 2d 350, 353 (Miss. 1978)(school board authorized to override superintendent's recommendation not to reemploy); Warner v. Board of Trustees, 359 So. 2d 345, 347-48 (Miss. 1978)(notice of decision not to reemploy must be given within seven days of statutory deadline).

[59] 1974 Miss. Laws ch. 577 (current version at MISS. CODE ANN. §§ 37-9-101 to -113 (Supp. 1978)).

[60] 1974 Miss. Laws ch. 577, § 1. The Act was amended in 1977. The amended version is entitled the "School Employment Procedures Act of 1977," and is found at MISS. CODE ANN. §§ 37-9-101 to -113 (Supp. 1978).

decision not to rehire them.[61] The Act also made a hearing available at the terminated employee's request.[62] Subsequent to the passage of the Act, serious questions arose concerning just what rights the Act conferred upon public school employees.

It is clear that before the Act was passed, there was no tenure system for public school teachers in Mississippi.[63] A school

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[61] 1974 Miss. Laws ch. 577, § 3 (current version at MISS. CODE ANN. § 37-9-105 (Supp. 1978). The original notice provision of the Act provided:

> Section 3. Persons Entitled to Notice. Any employee of a school district who has been employed by such district during the entirety of the preceding school year, shall be given notice within seven (7) days of the decision that he not be offered a contract for reemployment for the succeeding school term when:
>
> (a) by January 15 the board of trustees of the school district does not reemploy the superintendent;
>
> (b) by February 15 the superintendent of a school district does not recommend the reemployment of a principal or by March 1 the board of trustees of the district does not approve the recommendation of the superintendent for the reemployment of a principal; or
>
> (c) by April 1 the principal does not recommend to the superintendent the reemployment of a teacher, or by May 1 the principal does recommend the reemployment of a teacher and the superintendent does not approve the recommendation for the teacher's reemployment, or by May 1 the principal and superintendent both recommend the reemployment of a teacher and the board of trustees of the district declines the recommendation.
>
> Section 4. Notice. Except in the case of nonreemployment of the superintendent, notice shall be tendered by the superintendent to any employee within seven (7) days of the date when the recommendation to reemploy would have been made under the terms of Section 37-9-15 and 37-9-17 and amendments thereto.
>
> In the case of the superintendent who is not offered a contract for reemployment by January 15 or other date set by Section 37-9-13, Mississippi Code of 1972, the president of the board of trustees shall tender notice to such superintendent within seven (7) days of the date of the board's decision.
>
> The notice shall be mailed by certified mail, return receipt requested.

1974 Miss. Laws ch. 577, § 3.

[62] The original section 6 of the Act provided:

> Section 6. Hearing. The board shall, upon receipt of a request for a hearing from the employee, set the time, place and date of such hearing, and inform the employee of the same by registered mail return receipt requested. The hearing shall be conducted under rules of the board which shall embody due process of law and fairness for both parties. The board shall cause to be made a complete and accurate record of the proceedings of the hearing which shall be transcribed, and a copy shall be made available to the employee upon request provided that a charge for the copy not in excess of reporter's fees under Section 9-13-33, Mississippi Code of 1972, may be assessed the employee.
>
> The board shall notify the employee in writing of the decision of the board within seven (7) days after the date of the completion of the hearing.

1974 Miss. Laws ch. 577, § 6 (current version at MISS. CODE ANN. § 37-9-111 (Supp. 1978)).

[63] *See* McCormick v. Attala County Bd. of Educ., 407 F. Supp. 586, 594 (N.D. Miss.),

teacher or principal could be employed only upon annual recommendation by the county superintendent and confirmation by the school board.[64] Each board of education had the lawful right to refuse to rehire a teacher for any reason, or indeed for no reason at all, as long as the teacher's constitutional rights remained unmolested.[65] Since a teacher had no right to be rehired, a decision not to reemploy did not constitute a deprivation; thus, no hearing or other special procedure was constitutionally necessary before a school employee could be denied a new contract.[66]

The passage of the Fair Dismissal Act changed the school employment procedure in Mississippi. By the provisions of the Act, school boards were required to notify a teacher of the recommendation not to rehire within seven days of the making of the decision.[67] Moreover, the Act made a hearing before the board on the matter of reemployment mandatory at the option of the teacher not recommended for reemployment.[68] The supreme court soon made it apparent that the Act would be strictly interpreted; the court held that the notice requirement was not waivable,[69]

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vacated on other grounds, 541 F.2d 1094 (5th Cir. 1976) (Mississippi law provided no job tenure system for public school teachers). In Jennings v. Meridian Mun. Separate School Dist., 337 F. Supp. 567, 570 n.1 (S.D. Miss.), *aff'd*, 453 F.2d 413 (5th Cir. 1971), the court said of Mississippi's school teacher employment system: "[N]o teacher hired under any contract has any vested right to be rehired under any circumstances. That is known as tenure which teachers under such contracts do not have."

[64] *See* MISS. CODE ANN. § 37-9-15, -17 (Supp. 1978). *See also* Lott v. State *ex rel.* Kelly, 239 Miss. 97, 105, 121 So. 2d 402, 405 (1960) (county school board had no power to appoint principal not recommended by superintendent).

[65] *See* McCormick v. Attala County Bd. of Educ., 407 F. Supp. 586, 594 (N.D. Miss.), *vacated on other grounds*, 541 F.2d 1094 (5th Cir. 1976). See note 63 *supra*.

[66] *See* Board of Regents v. Roth, 408 U.S. 564, 578 (1972)(an untenured university teacher "did not have a property interest sufficient to require the university authorities to give him a hearing when they declined to renew his contract of employment"); Perry v. Sinderman, 408 U.S. 593, 599 (1972) ("The Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision somehow deprived him of an interest in 'liberty' or . . . a 'property' interest in continued employment . . . . ").

[67] 1974 Miss. Laws ch. 577, § 3 (current version at MISS. CODE ANN. § 37-9-105 (Supp. 1978)). See note 61 *supra*.

[68] 1974 Miss. Laws ch. 577, § 7 (current version at MISS. CODE ANN. § 37-9-113 (Supp. 1978)). See note 62 *supra*.

[69] *See* McDonald v. East Jasper County School Dist., 351 So. 2d 531, 533 (Miss. 1977) (Fair Dismissal Act held to require mandatory compliance with provision that notice by registered mail be given within seven days of decision not to rehire employee); Jackson v. Board of Educ., 349 So. 2d 550, 553 (Miss. 1977) (school board's failure to abide by mandatory notice requirement resulted in automatic renewal of employee's contract).

and, in addition, that any hearing held under the Act must comport with constitutional due process requirements.[70] However, a series of decisions by the supreme court was required to answer other questions spawned by the Act.

In 1976, the court was presented with a constitutional conflict: the Act called for a de novo trial before the chancery court where an appeal from a school board decision was made,[71] but previous court decisions had held that the Mississippi Constitution did not permit de novo review of administrative decisions.[72] The court held that appeals from school board decisions must be limited by the established scope of review for administrative agencies.[73] By 1978, almost four years after the passage of the original Fair Dismissal Act, the supreme court was still interpreting its provisions. Ambiguities in the Act created doubts about

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[70] In the absence of a statute to the contrary, a hearing is not constitutionally required before a nontenured teacher may be denied a new contract. See cases cited in note 66 *supra*. However, where a statute provides for such a hearing, even a constitutionally unnecessary one, the requirements of due process must be met. *See* McCormick v. Attala County Bd. of Educ., 407 F. Supp. 586, 595 (N.D. Miss.), *vacated on other grounds*, 541 F.2d 1094 (5th Cir. 1976). Where a statute affords a teacher such a hearing, due process requires that

> (a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist,
>
> (b) he be advised of the names and the nature of the testimony of witnesses against him,
>
> (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense,
>
> (d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.

Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

[71] 1974 Miss. Laws ch. 577, § 7 provided:

> Section 7. Appeals. Any employee aggrieved by the board's final decision shall have the right to appeal such decision, within thirty (30) days after receipt of the board's decision, to the appropriate chancery court in the manner provided in Section 11-51-79, Mississippi Code of 1972. Such hearing before the chancery court shall be de novo. An appeal to the Supreme Court in a manner provided by law may be taken from the decision of the chancery court.

Id. (current version at MISS. CODE ANN. § 37-9-113 (Supp. 1978)).

[72] *See, e.g.*, Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair, 222 So. 2d 664, 665 (Miss. 1969)(circuit court not permitted to retry case on appeal from Tax Commission).

[73] The chancery court may hear an appeal from a school board reemployment hearing only to determine whether the action was: "(1) supported by substantial evidence, (2) arbitrary or capricious, (3) beyond the power of the administrative agency to make, or (4) in violation of some statutory or constitutional right of the complaining party." Board of Trustees v. Acker, 326 So. 2d 799, 801 (Miss. 1976).

the meaning of the notice requirements, the authority of the school board to rehire a teacher in the absence of the superintendent's recommendation and whether the Act conferred a substantive right of reemployment upon public school teachers.

In *Lamar County School Board v. Saul*,[74] the appellee school principal, following a school board hearing, was notified that she would be rehired despite the superintendent's recommendation to the contrary. After the statutory notice period[75] had expired, the school board rescinded its decision to reemploy the appellee. The chancery court ruled that the board's recission was arbitrary and capricious and reinstated the board's original decision to rehire.[76]

On appeal to the supreme court, the school board argued, *inter alia*, that the Fair Dismissal Act was "unconstitutionally vague"[77] since it contradicted the superintendent's statutory right to recommend school principals to the board for employment.[78]

Acknowledging that section 37-9-15 of the Mississippi Code gave the superintendent the sole right to recommend principals, the court reasoned that the hearing provided for by the Fair Dismissal Act would be pointless if the board were not allowed to hire in the absence of the superintendent's recommendation.[79] Pointing out that repeals by implication are not favored, the court nevertheless reasoned that where two statutes conflict, the earlier statute is deemed to have been repealed insofar as it conflicts with the later one.[80] With that rule in mind, the court held that under the Fair Dismissal Act a school board must be allowed to rehire a school employee without the superintendent's recommendation.[81] Since the school board's original reemployment of the appellee had been legal and the notice period had expired before the board's recission, the court affirmed the chancellor's setting aside of the recission order.[82]

In *Warner v. Board of Trustees*[83] the court was called upon

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[74] 359 So. 2d 350 (Miss. 1978).
[75] MISS. CODE ANN. § 37-9-105 (Supp. 1978).
[76] 359 So. 2d at 352.
[77] *Id.*
[78] *See* MISS. CODE ANN. § 37-9-15 (Supp. 1978).
[79] 359 So. 2d at 353.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 354.
[83] 359 So. 2d 345 (Miss. 1978).

to interpret the notice requirements of the Fair Dismissal Act. In *Warner,* a school principal employed by the appellee school board decided in late February, 1976, not to recommend the appellant, a schoolteacher, to the school superintendent for reemployment. The superintendent notified the appellant on March 25 of the decision not to rehire her.[84] The appellant contended that under the Act she should have been notified within seven days of the time the decision was actually made, sometime in February. The school board contended that the seven day period commenced running on the statutory deadline for the making of employment decisions, April 1, which would have given the superintendent until April 8 to notify the appellant.[85]

According to the court, the conflict was between section 3 of the Act,[86] which requires the superintendent to notify the teacher within seven days of the decision not to reemploy, and section 4,[87] which required that notice be given within seven days of the date by which a reemployment decision would have been made under section 37-9-17, that day being April 1.[88] The rules of statutory construction, the court reasoned, require that where two provisions in the same statute conflict, the latter expression must govern the former.[89] Given that rule, and since an amendment to the Act passed after the instant case arose had deleted section 3,[90] the court determined that the legislature had intended section 4 to be controlling.[91] Since the appellant had been notified well before the April 8 deadline established by section 4, the court affirmed the chancellor's decision and upheld the school board's action.[92]

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[84] *Id.* at 346-47.

[85] *Id.* at 347.

[86] 1974 Miss. Laws ch. 577, § 3 (current version at MISS. CODE ANN. § 37-9-105 (Supp. 1978).

[87] 1974 Miss. Laws ch. 577, § 4, *repealed by* 1977 Miss. Laws ch. 489, § 6 (repeal effective July 1, 1977).

[88] MISS. CODE ANN. § 37-9-17 (1972) provides in part:

> On or before April 1st of each year, the principal of each school shall recommend to the superintendent of the school district the teachers to be employed for the school involved except those teachers who have been previously employed and who have a contract valid for the ensuing scholastic year . . . .

[89] 359 So. 2d at 347 (citing Coker v. Wilkinson, 142 Miss. 1, 16, 106 So. 886, 887 (1926)).

[90] *See* MISS. CODE ANN. § 37-9-105 (Supp. 1978).

[91] 359 So. 2d at 348.

[92] *Id.*

In *Board of Education v. Hamblin*,[93] the supreme court dealt with the question of whether the Fair Dismissal Act conferred any rights of reemployment upon school employees. On January 20, 1976, the school superintendent decided not to recommend the appellee, a school principal, for reemployment. Shortly thereafter in an informal session, the school board voted to rehire the appellee. Subsequently, however, the board obtained an attorney general's opinion stating that the board could not override the superintendent's recommendation without a formal hearing. Following such a hearing, the board on February 20 voted not to rehire the appellee. On appeal, the chancery court found the board's action to be arbitrary and capricious and unsupported by substantial evidence, and ordered the board to rehire the appellee as principal.[94]

On appeal to the supreme court, neither party contended that the procedural requirements of the Fair Dismissal Act had not been met.[95] The court stated the issue presented on appeal as whether the Fair Dismissal Act created "a substantive right to reemployment by the appellee which requires the School Board to demonstrate good faith for failure to reemploy him."[96]

In its discussion, the court noted that no system of public school tenure had existed in Mississippi prior to passage of the Fair Dismissal Act.[97] The court acknowledged that from the Act's requirement that a hearing be held for the purpose of showing "reason" for a teacher's not being reemployed, a legislative intent to create a system of tenure could be inferred.[98] However, the court found that the legislature had not in fact intended the Act to establish a tenure system.[99] The Act, reasoned the court, was "limited to a procedural grant of notice and an opportunity to be heard."[100] After stating that the Act had created no substantive right of reemployment, the supreme court ruled that once a demonstrable reason had been given for the superintendent's non-

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[93] 360 So. 2d 1236 (Miss. 1978).
[94] *Id.* at 1238.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*

recommendation, the burden of proof was on the teacher requesting the hearing.[101] Since a reason had been given for not rehiring the appellee, the supreme court held that the appellee had been afforded due process; thus, the chancellor's ruling was reversed and judgment rendered for the appellant school board.[102]

The *Saul, Warner* and *Hamblin* cases arose and were decided under the Mississippi Public School Fair Dismissal Act of 1974.[103] The Act was amended in 1977, however, and is now known as the School Employment Procedures Act of 1977.[104] The new Act differs in several crucial aspects from the Fair Dismissal Act of 1974. The new Act clearly states that its purpose is not to create a system of tenure;[105] the time period within which notice must be given to teachers who are not being reemployed is clearly enunciated,[106] and the time period within which the board must notify a teacher of a hearing's results has been extended to ten days where the board conducts the hearing and thirty days where a hearing officer presides.[107] Additionally, the school board is now

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[101] *Id.* at 1240.

[102] *Id.*

[103] 1974 Miss. Laws ch. 577 (current version at MISS. CODE ANN. §§ 37-9-101 to -113 (Supp. 1978)).

[104] MISS. CODE ANN. §§ 37-9-101 to -113 (Supp. 1978).

[105] *Id.* § 37-9-101.

[106] *Id.* § 37-9-105 provides:

> In the event that a determination is made by a school district not to offer an employee a renewal contract for a successive year, written notice of nonrenewal shall be given within seven (7) days of the date when the recommendation to reemploy would have been made under the provisions of sections 37-9-15 and 37-9-17, and amendments thereto, but in any event no later than the following:
>
> (a) If the employee is a superintendent, the school district shall give notice of nonreemployment on or before February 1;
>
> (b) If the employee is a principal, the school district shall give notice of nonreemployment on or before March 1;
>
> (c) If the employee is a teacher or other professional educator, the school district shall give notice of nonreemployment on or before April 8.

[107] *Id.* § 37-9-111 provides:

> The board shall review the matters presented before it, or, if the hearing is conducted by a hearing officer, the record of the proceedings and, based solely thereon, conclude whether the nonreemployment determination is a proper employment decision, and shall notify the employee in writing of its final decision and reasons therefor. Such notifications shall be within thirty (30) days of the conclusion of the hearing if the hearing is conducted by a hearing officer and within ten (10) days of the conclusion of the hearing if the hearing is initially conducted by the board. If the matter is heard before a hearing officer, the board shall also grant the employee the opportunity to appear before the board to

statutorily authorized to execute contracts of employment in the absence of the superintendent's recommendation.[108] These changes should eliminate the ambiguities that caused the problems in *Saul, Warner* and *Hamblin*.

The new Act faced a constitutional challenge in *Acker v. Board of Trustees*,[109] which was decided by the Mississippi court without opinion and was subsequently dismissed on appeal to the United States Supreme Court. Appellant, who was denied a new contract after a hearing before the school board, contended, *inter alia*, that the Fair Dismissal Act was repugnant to the due process clause of the fourteenth amendment in providing for a hearing before the school board, a body that the appellant alleged was not an impartial decisionmaker.[110] It was unlikely from the outset that the appellant would prevail upon that contention before the Mississippi court, which had held in *Damper v. Lawrence County School District*[111] that since school board members have no personal stake in the decision of whether to rehire a school teacher, it cannot be urged that they do not constitute an impartial tribunal.[112] Even if it had been shown that the board members knew of the events leading up to the hearing, it would not have been enough to overcome the presumption of honesty afforded the board members.[113] The United States Supreme Court most likely agreed with the Mississippi court because of its own recognition of a strong presumption of integrity surrounding decisions of policymakers with decision-making power.[114]

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present a statement in his own behalf, either in person or by his attorney prior to a final decision by the board.

[108] *Id.* § 37-9-111 provides in part: "(6) In the event the decision of the school board is in favor of the employee, the board shall have the authority to order the execution of a contract with the employee for an additional period of one (1) year."

[109] 357 So. 2d 292 (Miss.), *appeal dismissed*, 99 S. Ct. 342 (1978).

[110] Brief for Appellant at 8, Acker v. Board of Trustees, 357 So. 2d 292 (Miss.), *appeal dismissed*, 99 S. Ct. 342 (1978).

Although the appellant's case arose under the original Fair Dismissal Act, the newer Employment Procedures Act stood to be affected by any ruling the United States Supreme Court might have made, since like its predecessor, it allows the school board to conduct reemployment hearings. *See* MISS. CODE ANN. § 37-9-111 (Supp. 1978).

[111] 344 So. 2d 130 (Miss. 1977).

[112] *Id.* at 132 (citing Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976)).

[113] 344 So. 2d at 132.

[114] *See* Withrow v. Larkin, 421 U.S. 35, 47 (1975).

III. Municipalities

During 1978 the supreme court decided five cases of particular interest to municipalities. Three of these cases involved annexation of territory by municipal corporations;[115] the remaining cases arose from disputes over validations of municipal bonds.[116]

A. Annexation

A municipality's power to extend its boundaries by annexation of territory is limited to that authority given by constitutional or legislative provisions.[117] In Mississippi, the legislature has provided for the extension of municipal boundaries by means of an ordinance passed by the governing authority of the municipality.[118] The ordinance must (1) contain a description of the territory to be annexed, (2) define the resulting change in boundaries, (3) describe the improvements the municipality proposes to make in the annexed territory, (4) describe "the manner and extent of such improvements," (5) include an approximation of the time necessary to make the improvements and (6) specify the services the municipality intends to provide to the annexed territory.[119] Once the ordinance is passed, the governing authority must file a petition in chancery court seeking ratification of the ordinance.[120] The petition should recite the fact of the passage of the ordinance, pray for its ratification and include as exhibits a certified copy of the ordinance and a map of the boundary changes that would result if the ordinance is given effect by the

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[115] *In re* Extension of Boundaries of City of Pearl, 365 So. 2d 952 (Miss. 1978); Extension of Boundaries of Horn Lake v. Renfro, 365 So. 2d 623 (Miss. 1978); Extension of Boundaries of City of Biloxi v. City of Biloxi, 361 So. 2d 1372 (Miss. 1978).

[116] Walters v. Validation of $3,750,000 School Bonds, 364 So. 2d 274 (Miss. 1978); Kerley v. City of Hattiesburg, 361 So. 2d 44 (Miss. 1978).

[117] *See* Delta Elec. Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 482, 510, 149 So. 2d 504, 513 (1963)(power to extend municipal boundaries must be granted by statute); Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830, 834 (1903)(municipalities have only that authority granted by statute). This proposition holds true throughout American jurisdictions. *See, e.g.*, Bradford v. City of Columbus, 118 Ind. App. 408, 78 N.E.2d 457, 458 (1948); Wagner v. City of Omaha, 156 Neb. 163, 55 N.W.2d 490, 493 (1952); Huntley v. Potter, 255 N.C. 619, 122 S.E.2d 681, 686 (1961).

[118] Miss. Code Ann. § 21-1-27 (1972). For a general discussion of annexation in Mississippi, see Pyle and Mockbee, *Municipal Annexation in Mississippi*, 45 Miss. L.J. 393 (1974).

[119] Miss. Code Ann. § 21-1-27 (1972).

[120] *Id.* § 21-1-29.

court.[121] After the petition is filed and proper notice is given,[122] a hearing is held.[123] Mississippi law authorizes the chancellor to enter a decree ratifying the proposed annexation if, following the hearing, a finding is made that the ordinance (1) is reasonable, (2) is required by public convenience and necessity and (3) will provide for reasonable public and municipal services to be rendered in the annexed area within a reasonable time.[124] At the hearing, the burden of proof is upon the municipal authorities proposing the annexation.[125]

Dodd v. City of Jackson[126] established the criteria to be used in determining the reasonableness of a proposed annexation ordinance. In *Dodd*, the supreme court stated that the chancellor should weigh carefully (1) the city's need for expansion, (2) whether the territory is reasonably within the path of expansion, (3) the potential health hazard from sewerage and waste disposal in the annexed area and (4) the city's financial ability to make the improvements and to furnish the municipal services promised.[127] Besides these four basic criteria, other factors have at times been weighed by the supreme court in determining reasonableness, including (1) whether persons in the area were already enjoying city services,[128] (2) whether annexation was vital to the safety of those in the annexed area and existing municipality[129] and (3) the credibility of the authorities proposing the annexa-

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[121] *Id.*

[122] *Id.* § 21-1-31 adopts the same procedure for notice by publication as is provided for the incorporation of a municipality by *id.* § 21-1-15.

[123] *Id.* § 21-1-33.

[124] *Id.*

[125] Walker v. City of Moss Point, 252 Miss. 511, 513, 175 So. 2d 173, 174 (1965); *In re* City of Philadelphia, 232 Miss. 582, 587, 100 So. 2d 100, 103 (1958); Spears v. City of Oxford, 227 Miss. 801, 805, 87 So. 2d 61, 61 (1956).

[126] 238 Miss. 372, 118 So. 2d 319 (1960).

[127] *Id.* at 384, 118 So. 2d at 324; *see* Pyle and Mockbee, *supra* note 118, at 412-13.

[128] *E.g.*, Bridges v. City of Biloxi, 253 Miss. 812, 822, 178 So. 2d 683, 687 (1965) (court observed that 50% of residents in annexed area already were served by city water system; annexation held reasonable), *appeal dismissed*, 383 U.S. 574 (1966); *see* Pyle and Mockbee, *supra* note 118, at 413.

[129] *E.g.*, Butler v. City of Gulfport, 253 Miss. 738, 743-46, 179 So. 2d 3, 5-6 (1965)(health hazards and lack of police protection in annexed area were persuasive on issue of reasonableness); Walker v. City of Moss Point, 252 Miss. 511, 515, 175 So. 2d 173, 175 (1965)(sanitation problem in annexed area and part of existing municipality proved necessity of annexation); *see* Pyle and Mockbee, *supra* note 118, at 413.

tion.[130] The chancellor must also be convinced that the city can make reasonable services available to the annexed area within a reasonable time.[131]

If the foregoing criteria are met, the chancellor will issue a decree granting the municipality's petition.[132] If only portions of the petition meet the criteria, the chancellor may modify the ordinance by allowing annexation of only the territory that would be proper under the statute's requirements.[133] If the criteria are not met, the chancellor must deny the petition.[134]

Any interested party to the hearing who is dissatisfied with the chancellor's decision may appeal to the supreme court.[135] The chancery court's decision will be disturbed, however, only if the court determines that the decision was unsupported by substantial evidence or was manifestly in error.[136]

The supreme court heard three annexation cases on appeal in 1978, but in the process shed little new light on the subject. The first case, *Extension of Boundaries of Biloxi v. City of Biloxi*,[137] was perhaps the most interesting. Biloxi is situated on two peninsulas; the only side of the city not bounded by water is bounded by the city of Gulfport.[138] The governing authority of

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[130] *E.g.*, City of Picayune v. Quick & Grice, Inc., 238 Miss. 429, 433-34, 117 So. 2d 718, 720 (1960)(court affirmed chancellor's finding of unreasonableness based on his weighing of conflicting testimony); *see* Pyle and Mockbee, *supra* note 118, at 413-14.

[131] In the following cases, five years was held to be a reasonable time: Bridges v. City of Biloxi, 253 Miss. 812, 819, 823, 178 So. 2d 683, 685, 687 (1965), *appeal dismissed*, 383 U.S. 574 (1966); Dodd v. City of Jackson, 238 Miss. 372, 378, 397, 118 So. 2d 319, 321, 331 (1960); *In re* Extension of Boundaries of City of Meridian, 237 Miss. 486, 490, 497, 115 So. 2d 323, 324, 328 (1959); *see* Pyle and Mockbee, *supra* note 118, at 416. In a case decided during the 1978 term, six years was held to be a reasonable time. *In re* Extension of Boundaries of City of Pearl, 365 So. 2d 952, 956-57 (Miss. 1978).

[132] MISS. CODE ANN. § 21-1-33 (1972).

[133] *Id.*

[134] *Id.*

[135] *Id.* § 21-1-37. To be an "interested" party under the terms of the statute one need not have taken an active interest in the chancery court proceeding. All persons owning property in the annexed area are technically interested parties to the proceeding. *See* Sperry Rand Corp. v. City of Jackson, 245 So. 2d 574, 574-75 (Miss. 1971)(right of appeal not limited to those who actively participated in chancery proceeding but extended to all property owners in area).

[136] City of Biloxi v. Cawley, 332 So. 2d 749, 751 (Miss. 1976)(supreme court will not disturb the chancellor's ruling unless manifestly wrong or against the overwhelming weight of the evidence); City of Picayune v. Quick & Grice, Inc., 238 Miss. 429, 434, 117 So. 2d 718, 720 (1960)(same).

[137] 361 So. 2d 1372 (Miss. 1978).

[138] *Id.* at 1374.

Biloxi, feeling a need for municipal expansion, adopted an ordinance annexing an area north of Biloxi which, while separated from the city by a navigable bay, was accessible by bridge.[139] Although a previous effort by the city to annex the area had failed, the chancellor found that the ordinance met the statutory requirements and granted the city's petition.[140]

On appeal to the supreme court, appellants contended, *inter alia*, that the chancellor had erred by not ruling that the decision in *City of Biloxi v. Cawley*,[141] which involved the same area, was res judicata and in finding the annexation ordinance to be reasonable.[142]

Citing *In re Extension of Boundaries of City of Indianola*,[143] the court held that a decision involving an unsuccessful earlier annexation attempt could not be binding upon the validity of a subsequent effort to annex since the statute does not limit the city's right to initiate annexation proceedings.[144] After reviewing the increases in the quality and quantity of services the area would receive if annexed by Biloxi, and recognizing that the area was in Biloxi's path of expansion, the court approved with modification[145] the ordinance passed by Biloxi.[146]

In *In re Extension of Boundaries of Pearl*,[147] the court heard a challenge to an annexation ordinance predicated primarily on jurisdictional and procedural grounds.[148] Mississippi law requires notice of the annexation hearing to be given by publication and by posting.[149] Section 13-1-145[150] of the Mississippi code provides that the posting of a legal notice may be proved by the filing of a copy of the notice and an affidavit of posting with the appropriate

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[139] *Id.*

[140] *Id.* at 1375.

[141] 332 So. 2d 749 (Miss. 1976).

[142] 361 So. 2d at 1373-74.

[143] 226 Miss. 760, 766, 85 So. 2d 212, 214 (1956).

[144] 361 So. 2d at 1375.

[145] The court's decree modified the ordinance to exclude certain territory that could not reasonably be annexed because of its geographical isolation from Biloxi. 361 So. 2d at 1374.

[146] *Id.* at 1377.

[147] 365 So. 2d 952 (Miss. 1978).

[148] *Id.* at 953.

[149] MISS. CODE ANN. §§ 21-1-15, -31 (1972).

[150] *Id.* § 13-1-145.

court.[151] No such filing was made in the instant case.[152] Moreover, no recording of the ordinance was made in the ordinance book of the city of Pearl either after the passage of the ordinance or before the filing of the petition by the city with the court,[153] despite a Mississippi statute requiring immediate recording of city ordinances.[154] Nonetheless, the chancellor found that the statutory requirements had been met and entered a decree affirming the annexation ordinance.[155]

On appeal, the appellants contended, *inter alia*, that the lower court had never obtained jurisdiction in the case since posting was never proven, and that the ordinance was void since it had not been recorded in the city ordinance book immediately upon passage.[156]

The supreme court first noted that the rights of municipalities are granted by the legislature and that procedures attendant to those rights must be complied with strictly.[157] Where posting has not been proved, a finding that proper notice was given cannot stand.[158] The court pointed out, however, that the statute provides only that the posting may be proved by affidavit, and does not preclude the use of other means.[159] Since the returns of the deputy sheriff who posted the notices were on file in the case, they were part of the record and provided sworn, trustworthy evidence adequate to support a finding that notice was properly given.[160]

Citing *City of Biloxi v. Cawley*,[161] the supreme court went on to observe that an annexation ordinance was without effect until approved.[162] The court thus held that a municipality was not required to record an annexation ordinance until the ordinance

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[151] *Id.*

[152] 365 So. 2d at 954-55.

[153] *Id.* at 955.

[154] Miss. Code Ann. § 21-13-13 (1972).

[155] 365 So. 2d at 953.

[156] *Id.*

[157] *Id.* at 954 (citing Myrick v. Incorporation of Stringer, 336 So. 2d 209, 210 (Miss. 1976)).

[158] 365 So. 2d at 954.

[159] *Id.*; *see* Miss. Code Ann. § 3-1-215 (1972).

[160] 365 So. 2d at 955.

[161] 278 So. 2d 389, 393 (Miss. 1973).

[162] 365 So. 2d at 955-56.

had been approved by the chancellor.[163] The court found that the opinion of the chancellor was supported by substantial evidence and affirmed the case.[164]

A third annexation case decided by the court during the past year, *Extension of Boundaries of Horn Lake v. Renfro*,[165] involved only the factual question of whether there was sufficient evidence to support the chancellor's dismissal of the petition, and was affirmed.[166]

B. Bonds

In *Kerley v. City of Hattiesburg*,[167] the Mississippi Supreme Court was confronted with a challenge to a chancery court's validation of $15,000,000 in hospital revenue bonds.[168] The controversy stemmed from the enactment by the Mississippi Legislature of a private act authorizing the city of Hattiesburg to issue bonds to provide funds for the acquisition of hospital facilities.[169] Pursuant to that Act, the Mayor and City Commissioners of Hattiesburg adopted a resolution to issue and sell bonds in the principal amount of $15,000,000, provided a majority of qualified electors ratified the issue in a special election.[170] The principal and interest on the bonds were to be paid only from monies received from the leasing of the hospital building to the Methodist Hospital of the Mississippi Annual Conference,[171] and upon the retirement of the bonds the hospital was to be conveyed to the lessee for a nominal consideration.[172] Notice of the special election was published[173] and a few weeks later the bond issue was approved by the electorate. Validation proceedings were then instituted in the chancery court.[174] After a hearing, the chancellor entered a

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[163] *Id.* at 956.

[164] *Id.* at 957.

[165] 365 So. 2d 623 (Miss. 1978).

[166] *Id.* at 626.

[167] 361 So. 2d 44 (Miss. 1978).

[168] *Id.* at 45.

[169] 1977 MISS LOC. AND PRIV. LAWS ch. 947. A copy of the act is appended as part of the opinion. 361 So. 2d at 55-61.

[170] 361 So. 2d at 45.

[171] *Id.* at 46-47.

[172] *Id.*

[173] *Id.* at 45-46. The notice of the special bond election appears at *id.* at 46.

[174] *Id.* at 46.

decree validating the issuance of the bonds.[175]

A group of taxpayers opposing the bond issue appealed the chancellor's decision and presented the court with five assignments of error: (1) the local and private act was unconstitutional since it suspended a general law;[176] (2) the bond issue was an unconstitutional loan of the city's credit to a private corporation;[177] (3) the electorate was insufficiently notified of the purpose of the bond issue;[178] (4) the bond issue violated state and federal constitutional prohibitions against the "establishment of religion;"[179] and (5) the legislative act violated the "spirit and letter" of the National Health Planning and Development Act of 1974.[180] In a lengthy and well-organized opinion the court rejected each of the appellant's contentions and affirmed the chancellor's validation of the bond issue.[181]

Crucial to an understanding of the court's rejection of the appellants' first contention that the local and private act was unconstitutional because it suspended a general law is the distinction between local or special legislation and general legislation. A law is special or local in nature if it is arbitrarily restricted to an area smaller than the territorial area of the state and applies only to members of a certain class rather than generally.[182] Since the enactment of local laws is inherently subject to legislative discretion and abuse, many states have constitutionally limited their legislature's authority to make laws that are special or local in nature.[183] Mississippi's Constitution contains two prohibitions

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[175] *Id.*

[176] *Id.* at 46-49.

[177] *Id.* at 49-51.

[178] *Id.* at 51-53.

[179] *Id.* at 53-54.

[180] *Id.* at 54; *see* National Health Planning and Development Act of 1974, 42 U.S.C. § 300k (Supp. 1978).

[181] 361 So. 2d at 54.

[182] *See, e.g.*, Gray v. Taylor, 227 U.S. 51, 52 (1913)(private acts are those relating to a particular place, or to several particular places, or to one or several particular counties); State v. Southern Pine Co., 205 Miss. 80, 93, 38 So. 2d 442, 446 (1949)(holding a law to be a general law rather than a special, local or private law since it applied uniformly to all classes "of persons, places or things requiring legislation peculiar to the particular class dealt with by the law.").

[183] *See, e.g.*, People v. Lyons, 374 Ill. 557, 30 N.E.2d 46, 51 (1940) (purpose of constitutional prohibition against special laws is to prevent the enlargement of the rights of one or more persons and the impairment of the rights of others); Craft v. Lambert, 228 Or. 76, 357 P.2d 513, 517 (1960)(law limited to a single county prohibiting off-duty employ-

on private laws: (1) special legislation enacted for the benefit of individuals or corporations where a general law would otherwise apply is prohibited; and (2) the suspension of an applicable general law for the benefit of an individual, private corporation or association is prohibited.[184] Although the legislature initially decides whether a general law would be applicable or adequate the state courts may review those decisions, and where a special act does violate the constitutional prohibitions, it may be annulled as unconstitutional.[185] It is also apparent, however, that if the constitutional proscriptions are adhered to, the act will not be set aside merely because of its special nature.[186]

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ment by policemen was not void in the absence of express constitutional restrictions against local laws); Miller v. El Paso County, 136 Tex. 370, 150 S.W.2d 1000, 1001 (1941) (purpose of constitutional restrictions on special legislation is to prevent the granting of special privileges).

[184] MISS. CONST. art. 4, § 87 provides:

> No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of any general law be suspended by the legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted.

[185] *See* Yazoo & M.V.R. v. Southern Ry. Co., 83 Miss. 746, 773, 36 So. 74, 79 (1904) ("There is no restriction on the courts as to an act to suspend the operation of a general law for the benefit of an individual or private corporation or association.").

[186] MISS. CONST. art. 4, § 89 provides in pertinent part:

> There shall be appointed in each house of the Legislature a standing committee on local and private legislation . . . . No local or private bill shall be passed by either House until it shall have been referred to said committee thereof, and shall have been reported back with a recommendation in writing that it do pass, stating affirmatively the reasons therefor, and why the end to be accomplished should not be reached by a general law, or by a proceeding in court; or if the recommendation of the committee be that the bill do not pass, then it shall not pass the House to which it is so reported unless it be voted for by majority of all members elected thereto. *If a bill is passed in conformity to the requirements hereof, other than such as are prohibited in the next section, the court shall not, because of its local, special, or private nature, refuse to enforce it.*

(emphasis added). The Mississippi Supreme Court has adhered to this mandate several times. *See, e.g.*, Haas v. Hancock County, 183 Miss. 365, 374, 184 So. 812, 813 (1938)(the court will not "look to the journals of the legislature to see whether the legislature had complied with the provisions of section 89 of the Constitution in the passage of a local, private or special law"); Feemster v. City of Tupelo, 121 Miss. 733, 743, 83 So. 806 (1920)(since the appropriateness of such private acts rests in the discretion of the legislature, the courts "cannot refuse to enforce any law because merely in [its] judgment a general law would be better than a special one").

In the instant case, the appellants argued that because a general law had already provided the procedures through which municipalities might acquire hospital facilities, the special act had the effect of suspending that general law.[187] Rejecting that contention, the supreme court stated that the special act had merely provided an alternative means of acquring the facilities[188] and that the lawmakers' action was thus a permissible exercise of legislative discretion.[189]

The appellants' second argument was that the bond issue was a loan of the city's credit to a private corporation in violation of article 7 section 183 of the constitution.[190] In support of this contention, appellant cited *Giles v. City of Biloxi*,[191] in which the court held that a joint venture for profit between a city and a private corporation was within the purview of the section 183 prohibition.[192] The court distinguished the case on its facts and acknowledged that there did not appear to be a Mississippi case on point.[193] Although the court had held that municipal bonds could not be issued to aid private individuals or corporations in *Carothers v. Town of Booneville*,[194] the court emphasized that the Hattiesburg project was "of a public nature," and that it had been held in other jurisdictions that in such situations the issuance of municipal bonds was lawful "even though it will incidentally result in benefits to some individuals or private corporations."[195] Since the bond obligations were to be paid entirely from the proceeds of the lease and the credit and resources of the city

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[187] 361 So. 2d at 47. The appellants did not contend that the private act authorizing the bond issue was not passed in accordance with MISS. CONST. art. 4, § 89. 361 So. 2d at 48.

[188] 361 So. 2d at 49.

[189] *Id.*

[190] *Id.*; MISS. CONST. art. 7, § 183 provides: "No county, city, town, or other municipal corporation shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation, or loan its credit in aid of such corporation or association."

[191] 237 Miss. 65, 112 So. 2d 815 (1959).

[192] *Id.* at 88, 112 So. 2d at 824. In response to this argument the appellees cited Albritton v. Winona, 181 Miss. 75, 110-11, 178 So. 799, 809 (1938), where the court upheld a statute authorizing the issuance of general obligation bonds for industrial development because the taxes levied for the bonds were for a legitimate public purpose.

[193] 361 So. 2d at 50.

[194] 169 Miss. 511, 516, 153 So. 670, 671 (1934)(city passed act authorizing issuance of bonds to build factory to be leased to private business).

[195] 361 So. 2d at 51 (quoting 64 C.J.S. *Municipal Corporations* § 1909 (1950)).

were not pledged, the proscriptions of section 183 had not, according to the court, been violated.[196]

The appellant's third argument was that the bond issue should be invalidated since the notice of the election had not included a statement of the city's intention to convey the hospital facilities to the lessee for a nominal sum upon the retirement of the bonds.[197] Generally, notice of an election is sufficient if it contains a fair portrayal of the chief features of the proposition.[198] In the absence of fraud, irregularities that "do not prevent a full and free expression of opinion of the will of the electors, and do not affect or change the result, will not invalidate the election,"[199] which is presumed to be valid.[200] The supreme court held that since the resolution that initiated the election contained the terms of the lease, including the eventual transfer, and since the published notice referred to the resolution and included all pertinent terms of the bond issue, the notice was sufficient and could not have deceived the voters.[201]

The fourth argument asserted by the appellant was that the bond issue violated the first amendment to the United States

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[196] 361 So. 2d at 51. Implicit in the court's decision was the fact that the bonds issued by the City of Hattiesburg were revenue bonds rather than general obligation bonds. "Revenue bonds are issued to fund particular projects. Theoretically, the revenue from the projects are dedicated to liquidate the bond issue . . . . General obligation bonds are secured by the credit and integrity of the state only." Hollman and Primeaux, *Constitutional Limits of State Debt: Their Effects on Interest Costs*, 43 MISS. L.J. 461, 468-69 (1972). Revenue bonds are normally not considered to be loans of credit. *See, e.g.*, Nohrr v. Brevard County Educ. Facilities Auth., 247 So. 2d 304, 309 (Fla. 1971)(revenue bonds in aid to private college expansion program held not to be an unconstitutional loan of credit); Opinion of the Justices, 354 Mass. 779, 236 N.E. 2d 523, 526 (1968)(revenue bonds in aid of private higher education not an unconstitutional loan of credit); Clayton v. Kervick, 52 N.J. 138, 244 A.2d 281, 290 (1968)(revenue bonds for the purpose of constructing buildings to be leased to private colleges not an unconstitutional lending of credit).

[197] 361 So. 2d at 51.

[198] *Id.* at 51-52; *see, e.g.*, Spencer v. Mayor and Bd. of Aldermen, 215 Miss. 160, 174-75, 60 So. 2d 562, 567-68 (1952)(notice of proposition to be submitted to electors need only be stated in general terms); Mississippi Power & Light Co. v. Town of Batesville, 187 Miss. 737, 750, 193 So. 814, 816 (1940)(where bond issue was to finance city's acquisition of electric plant, it was not required that the notice specify how the plant was to be acquired).

[199] 361 So. 2d at 52 (quoting 15 E. MCQUILLIN, MUNICIPAL CORPORATIONS, § 40.14, at 276 (3rd ed. 1970)).

[200] 361 So. 2d at 52 (citing 15 E. MCQUILLIN, MUNICIPAL CORPORATIONS, § 40.16, at 285 (3rd ed. 1970)).

[201] 361 So. 2d at 52-53.

Constitution[202] and article 4 section 66 of the state constitution[203] since the issuance constituted governmental support to a religious institution.[204] The supreme court disagreed and cited authority for the proposition that in such situations neither constitutional prohibition was violated.[205] In *Hunt v. McNair*,[206] the United States Supreme Court upheld the issuance of a similar bond issue for the aid of a denominational college in South Carolina.[207] The Supreme Court upheld the validity of the issue on first amendment grounds since none of the expenses or reimbursements of the bonds were to be financed directly or indirectly by the general revenues of that state.[208] In *Craig v. Mercy Hospital-Street Memorial*,[209] the Mississippi Supreme Court upheld a grant of public funds to a private non-profit Catholic hospital since the section 66 prohibition of a "donation or gratuity" for a sectarian purpose did not entail a mere appropriation by the state.[210]

The appellants' last challenge on appeal was that the bond issue violated the "spirit and letter" of the National Health Planning and Development Act of 1974[211] since the facility's location would prevent "equal access" of all citizens of Hattiesburg to its services.[212] The appellants argued that the chancellor erred in refusing to hear evidence on this point.[213] Once again, the supreme court disagreed and held that the chancellor was statutorily required only to receive evidence that was "competent, rele-

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[202] U.S. CONST. amend. I.

[203] MISS. CONST. art. 4, § 66 provides: "No law granting a *donation or gratuity* in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the legislature, *nor by any vote for a sectarian purpose or use*." (emphasis added).

[204] 361 So. 2d at 53.

[205] *Id.* at 53-54 (quoting Hunt v. McNair, 413 U.S. 734, 737 (1973); Craig v. Mercy Hospital-Street Memorial, 209 Miss. 427, 439, 45 So. 2d 809, 814 (1950)).

[206] 413 U.S. 734 (1973).

[207] *Id.* at 737.

[208] *Id.*

[209] 209 Miss. 427, 45 So. 2d 809 (1950).

[210] *Id.* at 439, 45 So. 2d at 814.

[211] 42 U.S.C. § 300k (Supp. 1978).

[212] 361 So. 2d at 54.

[213] *Id.*

vant and material and not that which touched on collateral matters."[214] Thus, the chancellor's decision was affirmed.

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[214] *Id.* The court was referring to MISS. CODE ANN. § 31-13-5 (1972), which provides: "On the hearing the chancellor may hear additional competent, relevant and material evidence under the rules applicable to such evidence in the chancery court, so as to inquire into the validity of the bonds or other obligations proposed to be issued . . . ."

COMMERCIAL LAW

I. Commercial Law Cases

During the 1978 term the Mississippi Supreme Court decided fourteen cases in the field of commercial law. Five of these cases are noted in the following discussion.

A. Sale of Securities

In *State v. Russell*[1] the Mississippi Supreme Court considered whether the defendant in selling a negotiable promissory note without first taking proper action to secure an exemption or certificate of authority from the Secretary of State had violated the state's blue sky laws.[2] The defendant had allegedly violated section 75-71-31 of the Mississippi Code, which makes it unlawful to sell stocks, bonds, or other securities unless the Secretary of State issues a certificate approving the sale.[3] When the stocks, bonds, or securities are expressly exempted by statute and proper action is taken to secure the exemption, however, the blue sky laws do not apply.[4] Although the proper required action is not defined in the statute, it has been interpreted in regulations issued by the Secretary of State to be the action described in section 75-71-51.[5] This interpretation, in essence, applies the penalty

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[1] 358 So. 2d 409 (Miss. 1978).

[2] *Id.* at 410.

[3] Miss. Code Ann. § 75-71-31 (1972), provides in part:

> It shall [be] unlawful for any investment company or dealer or representative thereof, either directly or indirectly, to sell or cause to be sold, or offer for sale, any stocks, bonds or other securities (except as expressly exempted herein and proper action has been taken to secure said exemption) unless and until said secretary of state has approved thereof and has issued his certificate in accordance with the provisions of this chapter. . . .

[4] *Id.*

[5] Miss. Code Ann. § 75-71-51 (1972), provides in part:

> The provisions of this chapter shall not apply to any of the following classes of securities (exempt securities). Any issuer, investment company, or licensed Mississippi dealer may obtain a certificate of exemption, under the provisions set out above, upon the submission of an application, under oath, to the secretary of state. The request for a formal exemption may be submitted by the issuer, investment company, dealer, or its counsel, upon a form furnished by the secretary of state. The issuance of a formal certificate of exemption by the secretary of state shall be prima facie evidence that said securities are exempted

set out in section 75-71-31 to a violation of section 75-71-51.[6]

In affirming a trial judge's reversal of the defendant's conviction, the Mississippi Supreme Court noted that section 75-71-51 specifically states that "[t]he provisions of this chapter shall not apply to any of the following classes of securities (exempt securities)." Since the negotiable promissory note was one of the exempt securities, the penalty imposed by section 75-71-31 was not applicable to the negotiable promissory note.[7] Because of the ambiguity attached to the meaning of "proper action" in section 75-71-31, the court reasoned that the intention of the legislature was subject to several interpretations.[8] The court also noted that with regard to legislation subject to different interpretations the established rule requires that criminal statutes be construed strictly and in a light most favorable to the defendant.[9]

Since the statutes could be construed in the *Russell* case to exempt the failure to take proper action on the negotiable promissory note from the pertinent criminal provisions, the court affirmed the judge's reversal of the conviction without regard to

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from the qualifications and registration provisions of this chapter.

. . . .

8. Negotiable promissory notes or commercial papers.

[6] 358 So. 2d at 411.

[7] *Id.* at 411-12.

[8] *Id.* at 412.

[9] *Id.* The court cited Ratcliff v. State, 234 Miss. 724, 107 So. 2d 728 (1958), to support this statement. In *Ratcliff* a conviction for an interracial marriage was overturned since the statute involved required that the marriage be incestuous and void as well as interracial. The court enforced the statute as written though not as the legislature might have intended it. With a lack of incestuous relationship, the statute was not violated. *Id.; see* Carter v. State, 334 So. 2d 376, 377 (Miss. 1976) (affirming a conviction for armed robbery by a juvenile and construing the jurisdictional statute the court recognized the "general rule of construction that statutory exceptions are to be strictly and narrowly construed in favor of the accused"); Walton v. State, 219 Miss. 72, 75-76, 68 So. 2d 87, 89 (1953) (construing a statute making possession of alcohol for purposes of distribution in a dry county a crime, court followed the rule that penal statutes "are construed more strictly against the state"); State *ex rel.* Dist. Attorney v. Winslow, 208 Miss. 753, 761, 45 So. 2d 574, 576 (1950) (" 'If the meaning of a criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain necessary and essential provisions . . . the courts are not at liberty to supply the deficiency, or undertake to make the statute definite and certain.' "); Terry v. State, 172 Miss. 303, 304-05, 160 So. 574, 574 (1935) (construing a statute making it a crime to drive or control a car while intoxicated not to include intoxicated owner of the car riding in it); Ricks v. State, 146 Miss. 659, 661-62, 111 So. 752, 752 (1927) (construing statute prohibiting possession of intoxicating beverage not to include carrying another's bottle into another room).

legislative intent.[10] It also noted the established rule that the legislature has the sole power to fix crimes and their punishments,[11] and that this power may not be delegated to another.[12] In the principal case, therefore, the Secretary of State had no power to confer a criminal penalty where none was stipulated by statute.

The *Russell* case was properly decided by the court. The case clearly points to a lack of clear draftsmanship by the state legislature. While the intent of the legislature was more than likely to make section 75-71-51 the "proper action" called for in section 75-71-31 and to establish the neglect to take such proper action as a criminal offense, the inherent ambiguity in the statutes prevented the implementation of the apparent intent of the legislature. This intent could be effectuated and the ambiguity cleared if the legislature specified in section 75-71-31 the proper action to be taken.

B. Certificates of Deposit

Prior to the adoption of the Uniform Commercial Code, the Mississippi Supreme Court had held that certificates of deposit payable in the alternative became the property of the survivor upon the death of the alternative payee.[13] In *Thomas v. Eubanks*[14] the court considered the effect of the Code on this rule and concluded that when a certificate of deposit payable to the depositor

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[10] 358 So. 2d at 412.

[11] *See* Howell v. State, 300 So. 2d 774, 776, 780 (Miss. 1974). In *Howell* the court invalidated the State Board of Health's switching of amphetamines from a Schedule III to a Schedule II drug because the reclassification would have increased the length of the possible prison sentence for possession of the drugs. *Id.* at 781. The court reasoned that "the exclusive authority of the legislature to define crimes and fix the punishment therefor is without question." *Id.* at 780. Broadhead v. Tax Comm'n, 238 Miss. 239, 256, 117 So. 2d 881, 888 (1960) (legislature gave unreasonably broad discretionary power to commissioner to assess penalties); Arnold v. State, 213 Miss. 667, 671, 57 So. 2d 484, 485 (1952) (court held requirement of peace bond for one who has been convicted of an offense less than a felony was "consistent with the unquestioned constitutional power of the legislature to fix punishment for crimes").

[12] 300 So. 2d at 781. The *Howell* court stated: "We hold that the authority to define crimes and to fix the punishment therefor is vested exclusively in the legislature, and it may not delegate that power either expressly or by implication . . . ." *Id.*

[13] Myers v. Laird, 230 Miss. 675, 682, 93 So. 2d 828, 831 (1957); Shearin v. Coleman, 201 Miss. 193, 196, 28 So. 2d 841, 841 (1947).

[14] 358 So. 2d 709 (Miss. 1978).

or someone else is in the depositor's possession at his death it becomes the property of the depositor's estate.[15]

Through this action the court rejected its earlier decisions in *Shearin v. Coleman*[16] and *Myers v. Laird*,[17] both of which held that certificates of deposit payable in the alternative became the property of the survivor upon the other person's death. The court factually distinguished these two cases from the principal case on the ground that they were decided before the adoption of the Uniform Commercial Code in Mississippi.[18] The court reasoned that since section 75-3-116 requires possession, the survivor could not acquire rights to the certificate of deposit.[19]

The court's decision is clearly consistent with the weight of authority. The Draftsmen's Comment with regard to an instrument payable to two or more payees in the alternative or together states that the word "jointly" was eliminated from the Uniform Negotiable Instruments law to avoid any implication of a right of survivorship.[20] The Comment further notes that survivorship may be created by an express statement in the instrument.[21]

Case law from several states seems to support these propositions. In *Fehling v. Cantonwine*[22] the district court in Wyoming held that in an action by a wife to recover a note payable to her and her husband, the wife could not recover since no right of survivorship was stated in the note and nothing in the note could be construed to indicate a right of survivorship.[23] Even though the payees were husband and wife, the court refused to presume or imply joint tenancy in order to give rise to survivorship rights.[24]

In *Forehand v. Light*,[25] the Texas Supreme Court, in a suit to recover proceeds from two certificates of deposit payable to the deceased or her daughter, held that when an instrument contains no reference to survivorship rights, Texas and most other jurisdic-

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[15] *Id.* at 713.
[16] 201 Miss. 193, 28 So. 2d 841 (1947).
[17] 230 Miss. 675, 93 So. 2d 828 (1957).
[18] 358 So. 2d at 712.
[19] *Id.* at 713.
[20] U.C.C. § 3-110, Comment 1 (1972).
[21] *Id.*
[22] 379 F. Supp. 1250 (D. Wyo. 1974), *aff'd*, 522 F.2d 604 (10th Cir. 1975).
[23] 379 F. Supp. at 1253.
[24] *Id.* at 1252.
[25] 452 S.W.2d 709 (Tex. 1970).

tions will deny the claim to rights by the survivor.[26] The necessity for expressly creating survivorship rights is emphasized by the many cases upholding survivorship in conjunctive payees and payees in the alternative where survivorship is expressed.[27]

A few courts have held that something beyond what is expressly provided in the instrument may be examined for proof of a right of survivorship. Illustrating a definite minority position, the Iowa court held in *Petersen v. Carstensen*[28] that an instrument naming two payees in the alternative becomes the property of the surviving payee upon the death of one payee.[29] The court further ruled that evidence may be admitted to prove a contrary intention by the depositor-decedent.[30]

Advocating a slightly more restricted viewpoint than that found in *Petersen*, the Oklahoma court held in *Hendricks v. Grant County Bank*[31] that although the wording of a certificate of deposit payable in the alternative was not sufficient to create a joint tenancy with a right of survivorship, an intent by the depositor to create survivorship could be proved.[32]

In the principal case the Mississippi Supreme Court followed the majority view and held that the certificate of deposit payable in the alternative became the property of the payee's estate since that payee had possession of it at her death.[33] The court rejected the argument that the other payee named in the certificate was

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[26] *Id.* at 710; *see* Carnes v. Meador, 533 S.W.2d 365, 369 (Tex. Civ. App. 1975) (daughter of decedent denied survivorship rights to certificate of deposit since it contained no language creating survivorship).

[27] *See* Estate of White, 56 Ill. 2d 265, 307 N.E.2d 122, 123, 125 (1974) (a certificate of deposit payable to alternative payees "as joint tenants" held sufficient to create survivorship rights in the certificate for the surviving payee); *In re* Estate of Vale, 55 Ill. App. 3d 712, 371 N.E.2d 198, 199-200 (1977) (certificate of deposit payable to alternative payees "as joint tenants with rights of survivorship" was sufficient to give the survivor a right to the proceeds); Gunsaulis v. Tingler, 218 N.W.2d 575, 576-77 (Iowa 1974) (certificate of deposit payable to conjunctive payees as "joint tenants with right of survivorship and not as tenants in common" clearly created a joint tenancy and established survivorship rights); Fast v. Gulley, 271 N.C. 208, 155 S.E.2d 507, 509-10 (1967) (stock certificates held conjunctively by payees as joint tenants with the right of survivorship passed to survivor at the death of the other conjunctive payee).

[28] 249 N.W.2d 622 (Iowa 1977).

[29] *Id.* at 625-26.

[30] *Id.*

[31] 379 P.2d 693 (Okla. 1963).

[32] *Id.* at 696. This is also a minority position.

[33] 358 So. 2d at 713.

entitled to the ownership of the certificate of deposit because of joint ownership under section 81-5-63 of the Mississippi Code.[34] In dismissing this argument the court noted that the certificate of deposit was a negotiable instrument covered by the Uniform Commercial Code[35] and that under section 75-3-116 an instrument payable in the alternative is payable to either payee and may be negotiated, discharged, or enforced by the payee in possession.[36] The court reasoned that since the decedent had possession of the certificate, she was a holder in due course at her death and the certificate became an asset of the estate.[37]

While the *Thomas* court cites the Uniform Commercial Code as affirmative authority, no mention is made of the Draftsmen's Comment to section 75-3-110, which apparently gives rise to their interpretation of section 75-3-116.[38] In addition, a lack of case support for the court's holding may contribute to confusion in subsequent cases despite an apparent correct holding based on the facts of the instant case. An important issue left unresolved is whether the court has abolished all rights of survivorship in negotiable instruments despite the instrument's use of express language to the contrary. Against the clear weight of authority the court tends to reject the effect of such express language in negotiable instruments.[39] While acknowledging in the *Shearin* case that the certificate of deposit was payable in the alternative or to the survivor, the court distinguished the case from the instant decision because *Shearin* was decided prior to passage of the

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[34] MISS. CODE ANN. § 81-5-63 (1972), states in part:

When a deposit has been made or shall hereafter be made in the name of two (2) or more persons, payable to any one (1) of such persons or the survivor, or payable to any one (1) of such persons or to any one (1) of the survivors, such deposit or any part thereof or interest or dividends thereon, may be paid to any one (1) of said persons whether one (1) or more of said persons be living or not, and the receipt of acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made.

[35] 358 So. 2d at 712-13.

[36] *Id.* MISS. CODE ANN. § 75-3-116 (1972) provides:

An instrument payable to the order of two or more persons

(a) if in the alternative is payable to any one of them and may be negotiated, discharged, or enforced by any of them who has possession of it;

(b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

[37] 358 So. 2d at 713.

[38] See notes 21, 22 & 27 and accompanying text *supra*.

[39] See note 28 and accompanying text *supra*.

Uniform Commercial Code.[40] This distinction implies that *Shearin* may no longer be good law under the Uniform Commercial Code, contrary to the many cases recognizing express statements of survivorship under the Code.[41] Whether the mere word "survivor," or more, is now required to create a right of survivorship or whether there are now no survivorship rights in negotiable instruments in Mississippi are issues left unanswered by the instant decision.

C. Statute of Frauds

During the 1978 term the Mississippi Supreme Court handed down two important decisions concerning the statute of frauds under the Uniform Commercial Code. One case involved the statute of frauds for investment securities;[42] the other involved the statute of frauds for sales of goods.[43]

The investment securities statute of frauds in Mississippi provides that a contract for the sale of securities is not enforceable unless certain conditions are met.[44] In *Thomas v. Prewitt*[45] the court faced the question of whether the minutes of a stockholders' meeting signed by the corporation's president removes from the statute of frauds an oral contract by a stockholder to sell certain

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[40] 358 So. 2d at 712.

[41] See note 28 and accompanying text *supra*.

[42] MISS. CODE ANN. § 75-8-319 (1972).

[43] *Id.* § 75-2-201 (1972).

[44] *Id.* § 75-8-319 (1972) provides:

> A contract for the sale of securities is not enforceable by way of action or defense unless
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> (a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or
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> (b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or
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> (c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten (10) days after its receipt; or
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> (d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

[45] 355 So. 2d 657 (Miss. 1978).

stock. An additional issue before the court was whether equitable estoppel may be used to validate an otherwise unenforceable contract.

The buyers brought this action alleging that there was a contract for the sale of securities between them and the owner of the stock.[46] The alleged seller denied having entered into such an agreement and affirmatively pleaded that the contract was void and unenforceable by virtue of the investment securities statute of frauds in section 75-8-319 of the Mississippi Code.[47] Contending that the contract fell within an enumerated exception to the statute of frauds, the buyers of the stock asserted there was a sufficient writing evidencing the contract—the minutes of the stockholders' meeting prepared by the corporation's attorney and signed by the president.[48]

Noting that the minutes were not signed by the stockholder or an authorized agent of the stockholder as required by the first exception under section 75-8-319,[49] the court held that the minutes signed by the corporation's president were not sufficient to remove the contract from within the statute of frauds.[50] To support its holding the court cited *Konsuvo v. Netzke*.[51] In *Konsuvo* the plaintiff sought specific performance of an alleged agreement for the sale of stock.[52] Attempting to prove that there was a written memorandum of the contract to sell the stock, the plaintiff asserted that the minutes of a stockholders' meeting contained all the necessary elements evidencing a valid written contract and that the secretary of the corporation who had signed the minutes was an authorized agent of the defendant stockholders.[53] The court rejected this contention, however, and held that in order for an agency relationship to be binding on the principal there must be an express authorization by the principal.[54] No agency rela-

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[46] *Id.* at 658.

[47] *Id.* at 658-59.

[48] *Id.* at 659-60.

[49] MISS. CODE ANN. § 75-8-319(a) (1972).

[50] 355 So. 2d at 660.

[51] 91 N.J. Super. 353, 220 A.2d 424 (1966).

[52] 220 A.2d at 425.

[53] *Id.* at 435-36.

[54] *Id.* at 436; *see* Asbury v. Mauney, 173 N.C. 454, 92 S.E. 267, 269 (1917) (signing of minutes by corporation's secretary was insufficient for signed writing by an agent because he signed merely as corporation's secretary and not as an agent of a stockholder).

tionship was therefore created.

It has been held in certain cases that the minutes of a stockholders' meeting may constitute a writing sufficient to remove a contract from the statute of frauds.[55] These cases are distinguishable from the instant case, however, because the signing parties in these cases were actual holders of the stock and not merely officers acting for the corporation.[56]

As a second argument in the *Thomas* case the buyers contended that even if there were no applicable statutory exceptions to the statute of frauds, the principle of equitable estoppel applied to make the contract enforceable.[57] While this contention was seemingly the more problematic of the two asserted, the court disposed of it quite handily. Citing *Delta Lumber Co. v. Wall*[58] and *Tanner v. Walsh,*[59] the court held that the principle of equitable estoppel could not be applied to render an oral contract within the statute of frauds enforceable.[60]

The court noted that *Delta Lumber* was the only case where an estoppel was recognized to remove an otherwise unenforceable contract from the statute of frauds.[61] In this case the court held that an express oral promise by the defendant, upon which Delta Lumber relied in refraining from filing a mechanic's lien, was enforceable and the defendant was estopped from asserting the statute of frauds in defense.[62] The facts in *Delta Lumber,* however, more nearly approached fraud than those in the principal case.

The general rule in Mississippi was established later in *Tanner* where the court held that a landlord was not estopped to deny the existence of a three-year oral lease upon which a tenant had relied in making valuable changes upon the leased property.[63] The court held in essence that it was without power to create judicially an exception to the statute of frauds and was bound to

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[55] Cooper v. Vitraco, Inc., 320 F. Supp. 239, 241-42 (D.C.V.I. 1970) (incorporators' signing minutes concerning the sale of their stocks).

[56] *See id.*

[57] 355 So. 2d at 661.

[58] 119 Miss. 350, 80 So. 782 (1919).

[59] 184 Miss. 147, 183 So. 278 (1938).

[60] 355 So. 2d at 662.

[61] *Id.* at 661.

[62] 119 Miss. at 356-57, 80 So. at 784.

[63] 184 Miss. at 154-55, 183 So. at 279.

enforce the statute as written.[64]

With a foundation established for the general rule that there can be no equitable estoppel under the statute of frauds, the court next had to decide if this same rule would apply to the statute of frauds under the Uniform Commercial Code and, more specifically, to the investment securities statute of frauds.[65] The court concluded that the rule had the same effect with regard to the Uniform Commercial Code.[66] This result appears to be consistent with the Uniform Commercial Code's safety clause, which ensures the integrity of prior law not particularly changed by the Code.[67]

A split of authority exists concerning equitable estoppel as an exception removing an oral contract from the statute of frauds. While numerous jurisdictions recognize this exception,[68] many of these same jurisdictions apply it strictly and require substantial detrimental reliance as a result of fraud or deceit.[69] Several other

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[64] *Id.*, 183 So. at 279.

[65] 355 So. 2d at 661-62.

[66] *Id.* at 662.

[67] MISS. CODE ANN. § 75-1-103 (1972) states: "Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to the capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

[68] *See* Custis v. Valley Nat'l Bank, 92 Ariz. 202, 375 P.2d 558, 561-62 (1962) (recognizing that equitable estoppel can preclude the defense of the statute of frauds); Sacred Heart Farmer Coop. Elevator v. Johnson, 305 Minn. 324, 232 N.W.2d 921, 923 (1975) (noting that equitable estoppel was a supplement to the statute of frauds and other Uniform Commercial Code provisions and may take a contract out of the statute of frauds in proper cases); Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 230 N.W.2d 588, 595 (1975) (recognizing that the doctrine of equitable estoppel is available to defendants under the Uniform Commercial Code); W.R. Grimshaw Co. v. First Nat'l Bank and Trust Co., 563 P.2d 117, 122 (Okla. 1977) ("Estoppel is incorporated into the UCC as a supplemental principle of law."); Farmers Elevator Co. v. Lyle, 238 N.W.2d 290, 293 (S.D. 1976) (court found no "good reason why the doctrine of equitable estoppel should not be applied in a proper case to prevent a party from asserting the statute of frauds"); Fox v. Overton, 534 P.2d 679, 681-82 (Okla. 1975) (doctrine of equitable estoppel developed to prevent inflexible application of statute of frauds and the doctrine has apparently survived adoption of the Uniform Commercial Code).

[69] Custis v. Valley Nat'l Bank, 92 Ariz. 202, 375 P.2d 558, 561-62 (1962) (holding that although the plaintiff resigned his job and made other expenditures in reliance on the alleged oral contract to sell an automobile dealership to him, there was no deceit or substantial detrimental reliance and, therefore, no estoppel); Sacred Heart Farmer Coop. Elevator v. Johnson, 305 Minn. 324, 232 N.W.2d 921, 922-23 (1975) (holding that the doctrine did not apply to an oral contract to sell corn upon which plaintiff relied in arranging resale because no attempt to defraud or deceive existed); Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 230 N.W.2d 588, 595 (1975) (holding that an oral contract

jurisdictions adhere to the rule now followed in Mississippi that equitable estoppel does not remove an oral contract from the statute of frauds.[70] The Mississippi Supreme Court cited one such case to support its holding in *Prewitt*.[71]

The rule followed in Mississippi is one of proper formulation and continuance. Since the Uniform Commercial Code provides no contrary provisions, there is no reason why such a long-established Mississippi rule, which, though not in accordance with the law of some jurisdictions, should be changed.

In another significant case this term, *Wholesale Materials Co., Inc. v. Magna Corp.*,[72] the Mississippi Supreme Court considered the requirements necessary to remove an oral contract from the statute of frauds in a sale of goods.[73] In this case Wholesale Materials refused to pay the alleged balance due on an open account to Magna because of an alleged oral agreement to buy steel reinforcing bars at a lower price.[74] Wholesale Materials attempted to introduce a letter and a purchase order as written memoranda to remove the contract from the statute of frauds.[75] Noting that there was no evidence that the memoranda had been received by Magna as required by the Uniform Commercial Code, the court held that the memoranda were insufficient grounds for removal.[76]

The Mississippi statute of frauds applicable to transactions between merchants is satisfied if a writing in confirmation is received and no objection is made to it within ten days.[77] The

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relied upon to negotiate a resale of soybeans was not removed from the statute of frauds by equitable estoppel since there was no considerable concealment of material facts).

[70] *See* Cox v. Cox, 292 Ala. 106, 289 So. 2d 609, 612 (1974) (refusing to recognize any exceptions to the statute of frauds that were nonstatutory); Borrello v. Lauletta, 317 A.2d 254, 255 (Pa. 1974) (holding that with regard to leases estoppel may not be invoked to take an oral contract out of the statute of frauds); Polka v. May, 383 Pa. 80, 118 A.2d 154, 156 (1955) (holding that even if the defendant had exercised deceit with regard to an oral contract the principle of estoppel could not have been invoked to take an oral contract out of the statute of frauds).

[71] 355 So. 2d at 662, (citing Cox v. Cox, 292 Ala. 106, 289 So. 2d 609, 612 (1974)).

[72] 357 So. 2d 296 (Miss.), *cert. denied*, 99 S. Ct. 346 (1978).

[73] 357 So.2d at 297-98.

[74] *Id.* at 296-97.

[75] *Id.* at 297-98.

[76] *Id.* at 299; *see* MISS. CODE ANN. § 75-2-201(2) (1972).

[77] MISS. CODE ANN. § 75-2-201 (1972) states in part:

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party

language clearly indicates that the writing must be received, and this same section has been adopted in almost every other state.[78] Some of the confusion concerning the requirement for receipt may have originated with the Official Code Comment, which seems to suggest that receipt of the writing is not required.[79] By referring to subsection (1) of code section 2-201, however, this comment appears to refer to a writing that has been signed by the party to be charged.[80] This view is substantiated by case law requiring that a writing in confirmation of the contract must have been received for the merchants' exception to apply.[81] The burden of

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receiving it has reason to know its contents, it satisfies the requirements of subsection (1) [so as to be enforceable] against such party unless written notice of objection to its contents is given within ten (10) days after it is received.

[78] *See, e.g.*, ALA. CODE tit. 7, § 2-201(2) (1975); CAL. COM. CODE § 23A-2201(2) (West) (1964); ILL. ANN. STAT. ch. 26, § 2-201(2) (Smith-Hurd 1964).

[79] Official Comment, UCC § 2-201 part 6, states in part: "It is not necessary that the writing be delivered to anybody."

[80] MISS. CODE ANN. § 75-2-201 (1972) provides in part:

(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not sufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

The application of Official Comment, UCC § 2-201, part 6 to contracts covered in § 2-201(1) seems to be substantiated by the context of the Comment: "It is not necessary that the writing be delivered to anybody. It need not be signed or authenticated by both parties but it is, of course, not sufficient against one who has not signed it."

[81] *See* Dairyman's Coop. Creamery Ass'n v. Leipold, 34 Cal. App. 3d 184, 188, 109 Cal. Rptr. 753, 755 (1973) (although there were copies of the invoice and shipping order there was no evidence from which it could be inferred that the defendant had received the originals); Tabor & Co. v. Gorenz, 43 Ill. App. 3d 124, 356 N.E.2d 1150, 1153-54 (1976) (acknowledging receipt of confirmation as requirement to remove contract from statute of frauds by merchants' exception); Pillsbury Co. v. Buchanan, 37 Ill. App. 3d 876, 346 N.E.2d 386, 388 (1976) (to assert statute of frauds defense "the evidence must have established that Buchanan received the confirmation"); *In re* Les Belles Enterprises, Inc., 17 UCC Rep. 909, 909 (N.Y. Sup. Ct. 1975) ("[T]o place this case within the provisions of UCC section 2-201 . . . the court must first find that the written confirmation was received. . . ."); Harry Rubin & Sons, Inc. v. Consolidated Pipe Co., 396 Pa. 506, 153 A.2d 472, 475 (1959) (as between merchants the statutory requirements to take an oral contract out of the statute of frauds are: (1) a writing in confirmation of the oral contract prepared within a reasonable time; (2) a writing sufficient to bind the sender; (3) that the writing be received; and (4) that no reply was made to the writing); Nelson v. Unity Equity Co-operative Exch., 536 S.W.2d 635, 637 (Tex. Civ. App. 1976) (evidence supported trial court's finding that the confirmation of the oral sales agreement was mailed and received).

proving receipt is on the sender, who may raise a rebuttable presumption of receipt by showing direct evidence that the writing was properly prepared, addressed, and mailed.[82] This view apparently prevails in Mississippi as well.[83] In the instant case, while testimony was presented concerning regular office procedures,[84] no testimony was given concerning the actual mailing of the letter or the purchase order.[85] Since no rebuttable presumption of receipt was raised, no receipt complying with the statute was found. The oral contract, therefore, remained subject to the statute of frauds.

D. Statute of Limitations

Mississippi applies a three-year statute of limitations to actions on open accounts,[86] while the Uniform Commercial Code carries a six-year statute of limitations for the same type action.[87]

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[82] *See* W.E. Edmundson v. Air Service Co., 123 Ga. App. 263, 180 S.E.2d 589, 590-91 (1971) (before a presumption of receipt arises the sender must prove the letter was written, properly addressed, and duly mailed with correct postage); Tabor & Co. v. Gorenz, 43 Ill. App. 3d 124, 356 N.E.2d 1150, 1154 (1976) (receipt is presumed for a letter properly addressed, stamped, and mailed because of the probability of delivery and difficulty of the mailing party's proving receipt); Nafstad v. Merchant, 303 Minn. 573, 228 N.W.2d 548, 550 (1975) (supporting the jury's conclusion that a letter evidencing exercise of an option had been received, court noted that a presumption of proper mailing is proved by evidence of habit or custom plus evidence of compliance with custom); Seven Provinces Ins. Co., Ltd. v. Commerce and Indus. Ins. Co., 65 F.R.D. 675, 683 (W.D. Mo. 1975) ("In order to raise a rebuttable presumption of receipt of correspondence, a party must show by direct evidence that such correspondence was prepared, properly addressed, stamped and mailed or deposited in a proper place for the receipt of mail."); Johnson & Dealaman, Inc. v. Wm. F. Hegarty, Inc., 93 N.J. Super. 14, 224 A.2d 510, 513 (1966) (acknowledging general rule that rebuttable presumption of receipt is raised when mail is correctly addressed, stamped, and mailed).

[83] Threat v. Threat, 212 Miss. 555, 559, 54 So. 2d 907, 908-09 (1951) (where a letter was properly addressed with postage prepaid and mailed a presumption was raised that the deed of record was received and the addressee had the burden of rebutting this presumption).

[84] 357 So. 2d at 297.

[85] *Id.* at 298.

[86] MISS. CODE ANN. § 15-1-29 (1972) provides:

> Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after.

[87] MISS. CODE ANN. § 75-2-725 (1972). Embodied in § 75-2-725(1) is the applicable language: "An action for breach of any contract for sale must be commenced within six (6) years after the cause of action has accrued." *Id.*

This past year the Mississippi Supreme Court had the opportunity to decide which statute of limitations applies to actions on an open account that are covered by the Uniform Commercial Code.

In *Hughes v. Collegedale Distributors*,[88] Collegedale supplied health foods to Hughes, the owner of a health food store.[89] These items were purchased for resale on an open account and Collegedale sued for the balance due on this account.[90] Hughes pleaded as an affirmative defense the statute of limitations provided by section 15-1-29 of the Mississippi Code, which provides for a three-year statute of limitations for actions on open contracts.[91] The trial court rejected Hughes' contention and held that the Uniform Commercial Code's six-year statute of limitations was applicable.[92] On appeal, the Mississippi Supreme Court affirmed the trial court's decision and held that the six-year statute of limitations of the Uniform Commercial Code was applicable to an action on an open account.[93]

The court's decision to apply the six-year statute of limitations appears to be proper in light of the interpretation of the applicable statutes and similar cases in other jurisdictions. The Mississippi Code section applying the three-year statute of limitations to actions on open accounts[94] specifically exempts from its application transactions covered by the Uniform Commercial Code.[95] This being the case, the issue left to be determined is whether transactions such as the purchases in *Hughes* are covered by the Uniform Commercial Code's statute of limitations.

The Code provides a six-year statute of limitations for any contract for sale.[96] "Contract for sale" is defined by the Code as "both a present sale of goods and a contract to sell goods at a future time."[97] "Sale" is defined as the passing of title from a

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[88] 355 So. 2d 79 (Miss. 1978).

[89] *Id.* at 80.

[90] *Id.* at 79-80.

[91] See note 87 *supra*.

[92] 355 So. 2d at 80. The Uniform Commercial Code's statute of limitations is embodied in MISS. CODE ANN. § 75-2-725(1) (1972). See note 87 *supra*.

[93] 355 So. 2d at 80.

[94] MISS. CODE ANN. § 15-1-29 (1972).

[95] See note 87 *supra*. This statute provides that the three-year statute of limitations will apply "[e]xcept as otherwise provided in the Uniform Commercial Code." MISS. CODE ANN. § 15-1-29 (1972).

[96] MISS. CODE ANN. § 75-2-725(1) (1972).

[97] *Id.* § 75-1-106 (1972) provides in part:

seller to a buyer for a price.[98] In the principal case the purchases were clearly the result of contracts for sale that were subsequently breached. Since the purchases were contracts for sale, the Uniform Commercial Code's six-year statute of limitations was correctly applied. This holding in effect repeals the three-year statute of limitations with regard to accounts resulting from contracts for sale covered by the Uniform Commercial Code.[99] The statute was not repealed, however, with regard to contracts for the sale of goods to classes of buyers specifically exempted by the Code from the sales chapter.[100] Since Hughes in the instant case was not among the exempted classes but was a purchaser of goods in a business, the sales chapter was correctly held to be applicable to him.[101]

The application of the Uniform Commercial Code's statute of limitations to actions on open accounts has found similar support in numerous other jurisdictions.[102] These decisions, holding

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(1) In this chapter unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401). A "present sale" means a sale which is accomplished by the making of the contract.

[98] *Id.*

[99] "In providing a four-year [as provided by the Model Code rather than Mississippi's six-year] statute of limitations as to claims based upon the Code, the Code necessarily repeals prior inconsistent statutes." 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-725:20, at 560 (1971).

[100] MISS. CODE ANN. § 75-1-102 (1972) provides as follows:

Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

[101] 355 So. 2d at 81.

[102] *See* Champlain Milk Prod., Inc. v. M.F. Franks, Inc., 26 App. Div. 2d 988, 275 N.Y.S.2d 172, 174 (1966) (acknowledging application of § 2-725 of the code to an action on open account); Sesow v. Swearingen, 552 P.2d 705, 706-07 (Okla. 1976) (court held with regard to an open account that the adoption of the code superseded the general statute of limitations); Ideal Builders Hardware Co. v. Cross Constr. Co., 491 S.W.2d 228, 228 (Tex. Civ. App. 1972) (the code's longer statute of limitations applies to a suit on an open account); *cf.* Burton v. Artery Co., Inc., 279 Md. 94, 367 A.2d 935, 938 (1977) (code's statute of limitations is applicable to a suit for breach of contract to buy trees and shrubs); Big D. Serv. Co., Inc. v. Climatrol Indus. Inc., 523 S.W.2d 236, 236 (Tex. 1975) (court held that with regard to sworn accounts arising from contracts for sale the code's statute of limitations was applicable rather than the shorter statute of limitations for open ac-

as our court did in the principal case, further support the propriety of the Mississippi court's interpretation.

The *Hughes* majority distinguished the instant decision from the recent decision in *McArthur v. Acme Mechanical Contractors, Inc.*,[103] which held that Mississippi's three-year statute of limitations applied to an action on an open account.[104] *McArthur* was distinguished on the ground that it raised no issues concerning the Uniform Commercial Code.[105] Since the code was not involved, *McArthur* was held not to control the principal case despite the similarity in facts.

Dissenting in *Hughes,* Justice Smith suggested that there was no legislative intent to repeal the three-year statute of limitations with regard to open accounts by the passage of the Uniform Commercial Code's six-year statute of limitations.[106] He noted that if the legislature had intended to do away with the three-year statute of limitations, the statute's application to open accounts would have been specifically repealed.[107] The dissent further suggested that a more logical approach by the court would have been to apply the six-year statute of limitations only to written contracts which already had a six-year statute of limitations applied to them before the passage of the Uniform Commercial Code.[108] Additionally, the dissent relied strongly upon *McArthur* for support and did not agree with the majority's distinction of this case from the principal case.[109]

The majority opinion is correct in view of the similar application of the Uniform Commercial Code's statute of limitations in other jurisdictions[110] and the lack of an issue concerning the Code in *McArthur.*[111] Both the majority opinion and the dissent make overbroad statements, however, that are unsupported with regard to the nonapplicability of the Uniform Commercial Code's sales

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counts); Wilson v. Browning Arms Co., 501 S.W.2d 705, 705-06 (Tex. Civ. App. 1973) (applying code's statute of limitations to sworn accounts).

[103] 336 So. 2d 1306 (Miss. 1976).

[104] *Id.* at 1308-09.

[105] *Id.* at 1307.

[106] 355 So.2d at 82-83 (Smith, J., dissenting).

[107] *Id.* at 82.

[108] *Id.* at 84.

[109] *Id.*

[110] See note 103 and accompanying text *supra.*

[111] 355 So. 2d at 81.

chapter to farmers and consumers.[112] Both the majority and dissenting opinions base their assumption of nonapplication on the wording of section 75-2-102, which states that the sales chapter will not "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers."[113] From this wording, the court seems to infer that the sales chapter simply does not apply to consumers or farmers.[114] This interpretation is not correct. The purpose of the language is to prevent the repealing by implication of inconsistent statutes that were enacted specifically to benefit consumers, farmers, or other classes of buyers.[115] There is no implication anywhere to suggest the statute was meant totally to exclude farmers and consumers from the provisions of the sales chapter;[116] in fact, the Mississippi Supreme Court has acknowledged this view by applying sales chapter provisions both to farmers[117] and consumers.[118]

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[112] *Id.* at 81-82.

[113] MISS. CODE ANN. § 75-2-102 (1972), provides in part: "Unless the context otherwise requires, this chapter [does not] . . . impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers."

[114] 355 So. 2d at 82. Justice Sugg stated in dissent:

> I agree with the statement in the controlling opinion that in no event may any part of the Chapter on Sales of the Uniform Commercial Code . . . be applied to "sales to consumers, farmers or other specified classes of buyers." This exclusion from the provisions of the chapter is by the express terms of the chapter itself.

Id.

[115] *See* Mysel v. Gross, 70 Cal. App. 3d Supp. 10, 14 n.2, 138 Cal. Rptr. 873, 875 n.2 (1977) (the UCC's statute of limitations superseded California's because, as a general statute of limitations, California's protected no specific classes of buyers, including consumers).

[116] English v. Ralph Williams Ford, 17 Cal. App. 3d 1038, 1046, 95 Cal. Rptr. 501, 505 (1971). "The final clause of § 2102 is not one excluding particular transactions from the coverage of the Uniform Commercial Code. It merely states that the division on sales of the code does not impair or repeal any statute regulating sales to specified classes of buyers." *Id.*

[117] *See* Austin v. Montgomery, 336 So. 2d 745, 750 (Miss. 1976) (applying the UCC's statute of frauds to a transaction between cotton farmers and buyers of cotton); Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657-58 (Miss. 1975) (applying provisions of the sales chapter in an action to recover damages against a soybean farmer by a buyer); Ralston Purina Co. v. Howell, 254 So. 2d 911, 913 (Miss. 1971) (applying UCC's provisions on implied warranties of fitness to feed purchased by a hog farmer).

[118] *See* Chaney v. General Motors Acceptance Corp., 349 So. 2d 519, 521-22 (Miss. 1977) (applying UCC's sales chapter provisions to the purchase by consumers of an allegedly defective truck); Crocker v. Sears, Roebuck and Co., 346 So. 2d 921, 923 (Miss. 1977) (applying UCC's provisions on warranties in an action to recover for damages allegedly caused by defective stove bought by a consumer).

In light of this overbroad statement of the law by the court, the majority's further statement that the three-year statute of limitations should apply to farmers and consumers[119] is at best an issue that remains undecided. This issue can only be resolved in the light of legislative history and intent concerning whether the three-year statute of limitations is a protective statute for consumers, farmers, or other specified classes of buyers. If in the appropriate case it is found that the statute is intended specifically for the protection of consumers and farmers, the Uniform Commercial Code's six-year statute of limitations will not apply to transactions by these buyers. However, if the three-year statute of limitations is determined to be merely a general statute, the code's six-year statute of limitations will supersede it and will apply to transactions by consumers and farmers.[120] While this problem is not the primary issue in the principal case, the dictum that farmers and consumers are not covered by the sales chapter of the Uniform Commercial Code appears to be an overbroad statement that could lead to confusion in later cases.

II. Commercial Law Legislation

The primary commercial law legislation passed by the Mississippi Legislature included amendments to code sections 75-9-404, 75-11-101, and 75-11-103 through 75-11-107 to correct the effective dates from January 1, 1978, printed in the 1977 supplement, to April 1, 1978.[121] This act also added to section 75-9-403 the requirement that continuation statements be indexed.[122] The only other act passed by the legislature concerning commercial law in 1978 was an act to clarify the classification of marine vessels as goods under the Uniform Commercial Code.[123]

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[119] 355 So. 2d at 81.

[120] See note 116 *supra*.

[121] Miss. Code Ann. §§ 75-9-404, 75-11-101 to -107 (Supp. 1978).

[122] Miss. Code Ann. § 75-9-403 (Supp. 1978).

[123] Miss. Code Ann. § 75-9-105 (Supp. 1978).

CRIMINAL LAW AND PROCEDURE

I. Procedural Rights

A. In Futuro Right to Counsel

Miranda v. Arizona[1] established the principle that an accused is entitled to be informed of certain rights prior to custodial interrogation.[2] Among its several important mandates was the requirement that an indigent accused be made aware of his right to have court-appointed counsel present before and during in-custody interrogation.[3] If, however, police advise a suspect that counsel will be appointed if and when he goes to court, it is questionable whether such a warning adequately comports with the requirements of *Miranda*. Unfortunately, jurisdictions are split on the issue[4] and the United States Supreme Court has yet to resolve it.[5]

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[1] 384 U.S. 436 (1966).

[2] An accused must be informed that he has a right to remain silent, that any statement he makes may be used against him, and that he has the right to consult with a lawyer and have a lawyer present with him during an interrogation. *Id.* at 468-71. For a more detailed discussion of the *Miranda* decision see Warden, *Miranda: Some History, Some Observations and Some Questions,* 20 Vand. L. Rev. 39 (1966).

[3] 384 U.S. at 474; *accord,* Williams v. Twomey, 467 F.2d 1248, 1250 (7th Cir. 1972).

[4] *See generally* Note, *Criminal Procedure: Miranda Warning and the Right to "Instant Counsel"—A Growing Schism,* 29 Okla. L. Rev. 957 (1976) (analyzing the split). Some courts have vacillated on the issue. *Compare* Reese v. State, 462 P.2d 331, 333 (Okla. 1969) (warning of future right to appointed counsel falls short of *Miranda*) *with* Rowbotham v. State, 542 P.2d 610, 619 (Okla. 1975) (informing of in futuro right to counsel comported with *Miranda* requirements). The law is particularly unclear in the Fifth Circuit in light of two rulings on identical warnings that reached opposite results. *Compare* Gilpin v. United States, 415 F.2d 638, 641 (5th Cir. 1969) *with* United States v. Lacy, 446 F.2d 511, 513 (5th Cir. 1971). For further discussion of the predicament in the Fifth Circuit see notes 58 through 68 and accompanying text *infra.*

[5] Wright v. North Carolina, 415 U.S. 936, 936 (1973) (Douglas, J., dissenting), *denying cert. to* Wright v. North Carolina, 483 F.2d 405 (4th Cir. 1973). It has been suggested that with the presence of President Nixon's "strict constructionists" it is unlikely that, when it addresses the problem, the Court will broaden the much-ridiculed *Miranda* case. *See* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. Rev. 785, 810 (1970). It has also been suggested that some groups, perhaps police, actively desire increased judicial inquiry into the subject in hopes of gaining a platform to pursue restrictions on the *Miranda* mandates. Note, *supra* note 4, at 966. This seems to be a plausible point since some police departments have failed to delete disputed language in warnings after strong recommendations from the judiciary. *See* Harrell v. State, 357 So. 2d 643, 645 (Miss. 1978) (five years after first advising police to delete language it was still being used in printed waiver forms). The FBI is not included

Many jurisdictions have held that warnings that inform an accused of a future right to appointed counsel do not comply with the mandates of *Miranda*.[6] Mississippi, however, is among the jurisdictions that hold otherwise.[7] This position was reiterated by the Mississippi Supreme Court in the 1978 case of *Harrell v. State*.[8] In *Harrell* the following warning was in dispute:

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in this group since it responded to judicial input. *See* United States v. Cassell, 452 F.2d 533, 541 n.8 (7th Cir. 1971) (FBI deleted language disfavored by courts).

[6] *See* Williams v. Twomey, 467 F.2d 1248, 1250 (7th Cir. 1972) (informing of right to appointed counsel at trial is not an effective and express explanation as *Miranda* requires); United States v. Garcia, 431 F.2d 134, 134 (9th Cir. 1970) (offer of counsel must be firm); Gilpin v. United States, 415 F.2d 638, 641 (5th Cir. 1969) (warning informing accused of availability of appointed counsel only at trial fails); Lathers v. United States, 396 F.2d 524, 535 (5th Cir. 1968) (informing accused that judge will appoint attorney is not consistent with present right to counsel); Square v. State, 283 Ala. 548, 219 So. 2d 377, 378-79 (1968) (such a warning negates true rights); Moore v. State, 251 Ark. 436, 472 S.W.2d 940, 944 (1971) (for indigents the warning is defective); State v. Grierson, 95 Idaho 155, 504 P.2d 1204, 1207 n.1 (1972) (dictum called for elimination of challenged language); State v. Carpenter, 211 Kan. 234, 505 P.2d 753, 755-56 (1973) (court noted that the in futuro right to counsel warning was erroneous but held it harmless error because of other facts); State v. Creach, 77 Wash. 2d 194, 461 P.2d 329, 332-33 (1969) (warning failed to inform of right to counsel prior to questioning). *See generally* Coyote v. United States, 380 F.2d 305, 308 (10th Cir.) (warning must impart a clear, understandable explanation of all rights), *cert. denied,* 389 U.S. 992 (1967); Note, *supra* note 4, at 961.

[7] In 1973, the Mississippi Supreme Court held in three cases that warning an accused indigent of only a future right to appointed counsel was improper under *Miranda*. Burge v. State, 282 So. 2d 223, 226-27 (Miss. 1973), *cert. denied,* 415 U.S. 985 (1974); Holifield v. State, 275 So. 2d 851, 855 (Miss.), *cert. denied,* 414 U.S. 990 (1973); Evans v. State, 275 So. 2d 83, 86 (Miss. 1973). These decisions are consistent with holdings in several other jurisdictions. *See* Wright v. North Carolina, 483 F.2d 405, 406-07 (4th Cir. 1973) (warning is sufficient even with in futuro reference to appointed counsel), *cert. denied,* 415 U.S. 936 (1974); Massimo v. United States, 463 F.2d 1171, 1173-74 (2d Cir. 1972) (warning read as a whole is sufficient even with reference to future availability of appointed counsel), *cert. denied,* 409 U.S. 1117 (1973); Klinger v. United States, 409 F.2d 299, 308 (8th Cir. 1969) (same); Schade v. State, 512 P.2d 907, 915-16 (Alaska 1973) (telling accused when counsel was available did not dilute effectiveness of warning); People v. Gilmer, 182 Colo. 96, 511 P.2d 494, 496 (1973) *(Miranda* does not require a ritualistic formula of words); Lowe v. State, 250 So. 2d 310, 310 (Fla. 1971) (per curiam); State v. Maluia, 539 P.2d 1200, 1206-07 (Hawaii 1975) (court favored authority that sustained this type of warning); Burton v. State, 260 Ind. 94, 292 N.E.2d 790, 795-97 (1973) *(Miranda* language does not have to be followed exactly so long as there is a fair similarity in meaning); People v. Campbell, 26 Mich. App. 196, 182 N.W.2d 4, 6-7 (1970) (though in futuro statement may be ambiguous, warning as a whole was sufficient), *cert. denied,* 401 U.S. 945 (1971); People v. Swift, 32 A.D.2d 183, 300 N.Y.S.2d 639, 643-44 (1969) (since *Miranda* does not require station-house lawyers, warning was proper), *cert. denied,* 396 U.S. 1018 (1970); Jones v. State, 230 N.W.2d 677, 681 (Wis. 1975) (though not a model for clarity the warning was upheld). *See generally* Note, *supra* note 4, at 962-65.

[8] 357 So. 2d 643, 646 (Miss. 1978).

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the presence and advice of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.[9]

This warning was part of a printed form used by the county sheriff's department for obtaining waivers of fifth and sixth amendment rights.[10] After signing the waiver the accused made an incriminating statement that was admitted into evidence and used in convicting him.[11] Affirming the conviction, the Mississippi Supreme Court concluded that the warning incorporated in the waiver form properly informed the accused of his rights and was therefore adequate under *Miranda*.[12] The court reasoned that the last sentence of the warning, informing the accused of his right to stop answering until he talked with a lawyer, offset any ambiguity created by the sentence that informed the accused that appointed counsel was not available until he went to court.[13]

Five years prior to the *Harrell* decision, the Mississippi Su-

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[9] *Id.* at 644-45 (emphasis added).

[10] *Id.* at 644.

[11] *Id.* at 645. Prior to signing the written waiver and giving a statement, the accused was warned by the arresting officer as follows:

> You do not have to say anything. You have an absolute right to remain silent. Anything you might say can and will be used against you in a court of law. You have the right to talk to an attorney before talking to police, and you may have the attorney present while being questioned. You will be provided with an attorney if you want one and if you cannot afford one the attorney will be provided with no charge to you. If you do not desire to answer any questions or if you desire to discontinue the interview at any time you will not be compelled to continue.

Id. Since the accused gave his incriminating statement immediately after reading the written warning in the waiver form, and since the *Harrell* court determined the validity of the written warning standing by itself, *id.* at 646, the present discussion will be directed to the court's analysis of the written warning.

[12] *Id.* at 645-46.

[13] *Id.* at 646.

preme Court had recommended that police departments discontinue use of the in futuro warning.[14] Nevertheless, the police continued to use the disputed form and in *Harrell* the court reemphasized its disapproval of the warning.[15] The force of the court's criticism, however, was attenuated considerably by its ultimate decision.

In light of the split of authority and the inherent ambiguity of in futuro warnings, it is reasonable to inquire whether the *Harrell* decision granted judicial sanction to a warning that does not comport with the mandates of *Miranda.* Indeed, judging from language found in the *Miranda* decision itself, it may be argued that the in futuro warning simply fails to inform suspects of their rights.[16]

The United States Supreme Court held in *Miranda* that a detainee "must be *clearly* informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."[17] The Supreme Court was careful to point out that the warning of a right to counsel is meaningless unless it is also addressed specifically to the indigent, so as to inform him that exercise of the right does not depend upon his ability either to obtain an attorney or to afford one.[18] The Court noted that most confessions are elicited from persons too poor to retain counsel.[19] It thus ruled that an indigent accused must be informed that "[counsel] will be appointed for him *prior to any questioning.*"[20] The clear purpose of this mandate was to ensure that an accused indigent is aware and understands that though he cannot afford

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[14] *See* Burge v. State, 282 So. 2d 223, 227 (Miss. 1973) (considering a warning identical to the one in *Harrell,* the court suggested that "if and when you go to court" be deleted), *cert. denied,* 415 U.S. 985 (1974).

[15] 357 So. 2d at 645. Other jurisdictions have also discouraged use of in futuro warnings. State v. Grierson, 95 Idaho 155, 504 P.2d 1204, 1207 n.1 (1972) (noting the split of authority the court called for elimination of the disputed language); State v. Carpenter, 211 Kan. 234, 505 P.2d 753, 755 (1973) (the disputed language was erroneous but harmless). Aware of such recommendations the FBI dropped the phrase—"if and when you go to court or before a United States Commissioner"—from its warning. *See* United States v. Cassell, 452 F.2d 533, 541 n.8 (7th Cir. 1971).

[16] For further background of these arguments see Note, *supra* note 4, at 961-62.

[17] 384 U.S. at 467, 471-72 (emphasis added).

[18] *Id.* at 473.

[19] *Id.* at 472. The Court cited reports indicating that 50-90% of felony defendants are indigent. *Id.* at 472 n.40 (citing Polluck, *Equal Justice in Practice,* 45 MINN. L. REV. 737, 738-39 (1961)).

[20] 384 U.S. at 479 (emphasis added).

an attorney one will be appointed for him prior to police questioning.

The warning used in *Harrell* did not specifically inform the defendant that counsel would be appointed prior to questioning.[21] At one point he was told of his right to talk to a lawyer before questioning; at another point he was told that only if he went to court would counsel be appointed. Such advice could easily be interpreted as meaning that counsel would not be appointed prior to interrogation.

In *Gilpin v. United States*[22] the Fifth Circuit analyzed a warning that was part of a written waiver form identical to that used in *Harrell.*[23] The accused in *Gilpin* had made a confession after waiving his right to counsel.[24] The Fifth Circuit invalidated the confession because the accused had not been adequately apprised of his rights.[25] The court concluded that the warning failed to convey to the accused that he had the right to appointed counsel "during the interrogation."[26] Indeed, the court concluded that a "fair interpretation" of the warning was that the accused "would be given a lawyer only if he should go to court."[27]

Under the stress of a recent arrest[28] an accused indigent could

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[21] See text accompanying note 9 *supra.*

[22] 415 F.2d 638 (5th Cir. 1969).

[23] *Id.* at 639.

[24] *Id.*

[25] *Id.* at 639-41. Noting the heavy evidentiary burden imposed on the prosecution when it seeks to introduce statements taken without the presence of an attorney, *Miranda,* 384 U.S. at 475, the *Gilpin* court concluded that there had not been an intelligent waiver of counsel. 415 F.2d at 641.

Though the reasoning in *Gilpin* was well supported, the holding is questionable precedent in light of the subsequent Fifth Circuit decision in United States v. Lacy, 446 F.2d 511 (5th Cir. 1971) (per curiam), in which the validity of a warning indistinguishable from that rejected in *Gilpin* was upheld. See notes 58 through 68 and accompanying text *infra.*

[26] 415 F.2d at 640-41. At the time he made incriminating statements the accused in *Gilpin* was either "staggering" drunk or suffering from the side effects of the night before. *Id.* at 641. Although the accused's physical state was considered, the court emphasized the deficiency of the warning itself.

[27] *Id.* at 641. Ruling on an identical warning, the Alabama Supreme Court reasoned that the disputed wording "suggests that a lawyer will be provided only if defendant goes to court and negates the idea that a lawyer will be appointed 'prior to any questioning.'" Square v. State, 283 Ala. 548, 219 So. 2d 377, 378 (1968). Other jurisdictions have invalidated in futuro warnings on this basis. *See* Moore v. State, 251 Ark. 436, 472 S.W.2d 940, 944 (1971) (the warning simply does not meet the standard required for the warning of indigents); State v. Creach, 77 Wash. 2d 194, 461 P.2d 329, 332-33 (1969) (warning fails to express right to have counsel appointed prior to questioning).

[28] Concerning the affect of a recent arrest, the *Miranda* decision pointed out that

interpret the warning used in *Gilpin* and *Harrell* in a manner similar to that anticipated by the *Gilpin* court. Such an interpretation, however, would be grossly inconsistent with the precepts of *Miranda*. That an indigent defendant should not be expected to ascertain the scope of his constitutional rights on the basis of an ambiguous warning is a persuasive argument for requiring police to define those rights more clearly.[29]

The United States Supreme Court stated in *Miranda* that only by an "effective and express explanation" may an accused be adequately informed of his rights.[30] The *Harrell* court, however, ignored this requirement of clarity,[31] reasoning that by telling an accused of his right to remain silent until talking to an attorney, the police had offset any erroneous impression induced by the statement that counsel would not be appointed until trial. That the warning fell short of being an effective and express explanation of rights, however, is illuminated by this balancing of inconsistencies.

Though *Miranda* does not require that police departments provide simultaneous tender of counsel[32] or have a station-house lawyer,[33] it is explicit in prohibiting police from going forward with an interrogation if no counsel is available.[34] Unfortunately,

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custodial interrogation itself "trades on the weakness of individuals." 384 U.S. at 455. For discussion of the psychological pressures involved in interrogations, even for college-educated suspects, see Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 314-18 (1967).

[29] *See generally* Note, *supra* note 4, at 963.

[30] 384 U.S. at 473.

[31] In Williams v. Twomey, 467 F.2d 1248 (7th Cir. 1972), the Seventh Circuit invalidated a warning identical to that used in *Harrell* because it was "equivocal and ambiguous." *Id.* at 1250. Similarly, the Second Circuit has suggested "that a clear warning of the right to appointed counsel 'if and when he went to court' is more misleading than an altogether ambiguous mention of court appointed counsel." United States v. Carneglia, 468 F.2d 1084, 1091 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973).

[32] *See* Mayzak v. United States, 402 F.2d 152, 155 (5th Cir. 1968) (tender of counsel does not have to be concurrent with reading of *Miranda* warnings).

[33] Miranda v. Arizona, 384 U.S. at 474.

[34] Proscribing this tactic, the Supreme Court stated:

> [I]f police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege *so long as they do not question him during that time.*

Id. (emphasis added).

in Mississippi, court-appointed counsel often does not become available until several days after an arrest, generally at arraignment.[35] This procedure sets the stage for the type of police questioning *Miranda* was intended to prevent. To avoid a square confrontation with *Miranda* the police may, as in *Harrell*, first solicit a waiver of the right to remain silent and the right to counsel.[36] If the accused waives his rights, the police are then free to elicit incriminating statements through interrogation. By using this procedure police can circumvent the *Miranda* precepts and avoid at a particularly sensitive stage in the criminal process[37] that exercise of diligence so essential to the preservation of constitutional rights.

Not only was the accused in *Harrell* confronted with a contradictory explanation of his rights, he had to depend upon his layman's knowledge of possible consequences in waiving these rights.[38] Unfortunately, the *Harrell* decision may be viewed as

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[35] *See* Brief for Appellee at 7, Harrell v. State, 357 So. 2d 643 (Miss. 1978). Noting this procedure, the state argued that "[t]he statement that counsel can only be supplied when the defendant goes to court is merely a statement of practical expediency." *Id.*

[36] *See* 357 So. 2d at 644.

[37] This is a "stage when legal aid and advice" is most critical to an accused. Massiah v. United States, 377 U.S. 201, 204 (1964); *see* Escobedo v. Illinois, 378 U.S. 478, 486 (1964) (interrogation prior to formal indictment is such a critical stage); Powell v. Alabama, 287 U.S. 45, 69 (1932) (guidance of counsel is essential to advise accused of his rights at a critical stage). Even if an accused has a cognitive understanding of his rights he may nevertheless be unable to apply them in a "crisis-laden" situation. Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1376 (1968). Describing the situation that an accused is faced with upon arrest it has been noted:

> The suspect arrested and brought downtown for questioning is in a crisis-laden situation. The stakes for him are high—often his freedom for a few or many years—and his prospects hinge on decisions that must be quickly made: to cooperate and hope for leniency, to try and talk his way out, to stand adamantly on his rights. Unless he is a professional, the suspect is unlikely to know the movements of the law enforcement machinery. The likely consequences of the alternatives open to him are unclear—how much leniency cooperation may earn, how likely fast talk is to succeed, how much a steadfast refusal to talk may contribute to a decision by the police, prosecutor or judge to "throw the book" at him.

Interrogations in New Haven: The Impact of Miranda, 76 YALE L.J. 1519, 1613-14 (1967). Indeed, a study of well educated suspects, draft protestors who were college students and professors at Yale, indicated that they "lacked knowledge of the legal context of the decisions they faced [and] they could not make an informal choice whether to exercise their rights." Griffiths & Ayres, *supra* note 28, at 313.

[38] The accused in *Harrell* had a high school education. 357 So. 2d at 646.

supporting the state's argument that "practical expediency" necessitates not only that an accused be told that appointment of counsel will occur at trial, but also that an accused be requested to waive his constitutional rights before counsel becomes available. If a waiver is absolutely necessary to effective police investigation, the police should at least provide the accused with a clear picture of his rights. Otherwise, the will of an unenlightened accused may be easily overborne.[39]

An accused may waive "effectuation" of his rights "provided the waiver is made voluntarily, knowingly and intelligently."[40] When, as in *Harrell,* a statement is obtained in the absence of an attorney and is sought to be introduced into evidence, the prosecution has the "heavy burden" of proving that the accused "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[41] There are, however, no clear guidelines for determining what constitutes a knowing and intelligent waiver. It has been held that a defendant who is unaware of the legal significance of a statement is capable of making an intelligent waiver so long as he understands, at the time he makes the waiver, that he has the right to remain silent and to consult an attorney.[42] Therefore, the presence of counsel is not necessary for an accused to waive his rights

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[39] The *Miranda* Court came to the conclusion that the then current practice of incommunicado interrogation was inherently coercive. 384 U.S. at 467. One goal of the *Miranda* decision was to place an accused on the same footing with the police during interrogation. Whether *Miranda* accomplished this ideal even with clear and effective warnings is questionable. *See id.* at 516 (Harlan, J., dissenting) (warnings do not protect an accused if police are willing to lie from the start). *See generally* Amsterdam, *supra* note 5, at 804 (author concludes that Supreme Court decisions cannot provide adequate basis for protection of suspect in station-house).

[40] Miranda v. Arizona, 384 U.S. at 444.

[41] *Id.* at 475. *See also* Johnson v. Zerbst, 304 U.S. 458 (1938). In *Johnson* the Court stated that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464.

[42] *See* Harris v. Riddle, 551 F.2d 936, 939 (4th Cir. 1977) (misunderstanding evidentiary value of statement is not the test), *cert. denied,* 434 U.S. 849 (1978); Frazier v. United States, 476 F.2d 891, 898-99 (D.C. Cir. 1969) (intelligent waiver though defendant was unfamiliar with criminal law and rules of evidence); State v. McKnight, 52 N.J. 35, 243 A.2d 240, 251 (1968) ("man need not have the understanding of a lawyer to waive one"). The *McKnight* court read *Miranda* as intimating that if a defendant is properly informed of his right to silence, of the hazard of incrimination and of his right to appointed counsel, then " '[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver.' " 243 A.2d at 251 (quoting *Miranda,* 384 U.S. at 475) (emphasis added).

knowingly and intelligently.[43] These rules, however, are not applicable to the *Harrell* situation since it was not evident that the accused in *Harrell* understood his right to counsel.

The pertinent question is whether a signed waiver form, such as the one in *Harrell,* is indicative of a knowing and intelligent waiver.[44] The Supreme Court in *Miranda* intimated that a waiver form was not evidence sufficient to meet the prosecution's heavy burden. The Court stated "[t]he mere fact that the accused signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."[45] Therefore, the "I understand my rights" clause in the waiver form used in *Harrell* does not appear to be sufficient in itself to prove that the accused acted knowingly and intelligently.

To act knowingly and intelligently one must, of course, have some understanding of the rights involved. The ostensible purpose of *Miranda* warnings is to foster such an understanding.[46] However, empirical studies have shown that a significant number of suspects fail to comprehend the implications of unequivocal *Miranda* warnings;[47] and intentional vagueness and obfuscation

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[43] *See* State v. Green, 51 Haw. 260, 457 P.2d 505, 508 (1969) (responding without counsel because suspect lacks understanding of significance of lawyer is irrelevant).

[44] With respect to waivers generally, the *Miranda* Court stated: " 'The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.' " 384 U.S. at 475 (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)). *See generally* Medalie, *supra* note 37, at 1367.

[45] 384 U.S. at 492. In addition to the warning of rights, the form in *Harrell* included the following language:

> I have read the statement of my rights as shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

357 So. 2d at 644.

[46] *See* Miranda v. Arizona, 384 U.S. at 467 (warnings combat inherently compelling pressures of interrogation).

[47] In an extensive study conducted in Washington, D.C., in June of 1966 through June of 1967, it was found that 24% of those accused failed to understand the warning of the right to appointed counsel. Medalie, *supra* note 37, at 1374. The warning used in this study, unlike the inherently ambiguous one used in *Harrell,* stated:

> You have been placed under arrest. You are not required to say anything to us at any time or to answer any questions. Anything you say may be used against you as evidence in Court. Your lawyer may be present here during the police

can only make matters worse.[48] Concluding that *Miranda* warnings by themselves cannot provide any assurance of an intelligent apprehension of rights, a study by the *Yale Law Journal* stated:

> Warnings help . . . [b]ut in a system so laced with discretion—discretion for the police, for the prosecutor, for the judge—a knowledge of formal rights, even if fully comprehended, may not help the suspect too much. As long as the police question the suspect alone, he is no match for them. The suspect will not grasp firmly his rights. He will try to deal with his captors, to talk his way out, and he is enormously inadequate to that task.[49]

There is, of course, no way to determine conclusively whether the accused in *Harrell* made a knowing and intelligent waiver of rights. The court's failure to address this issue adequately, however, suggests that signed waivers are subject to no more than perfunctory examination by the Mississippi Supreme Court.

In contrast, the Fifth Circuit imposes a heavy burden upon the government to establish the existence of an affirmative waiver. In *Gilpin* the Fifth Circuit held that the prosecution's

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> interrogation and you may consult with him. If you cannot afford to retain a lawyer privately, you have the right to have a lawyer appointed to represent you free of charge at the police station.

Id. at 1372-73 n.100. To make this study possible, volunteer attorneys in the area's junior bar were on call 24 hours a day to go to the station-house. Astonishingly, only 7% of 15,430 persons charged with felonies and serious misdemeanors in one year requested counsel. *Id.* at 1352. They were not, perhaps, fully aware of their rights.

In a study conducted by the *Yale Law Journal* in New Haven, Connecticut, similar results were reached. *Interrogations in New Haven: The Impact of Miranda, supra* note 37, at 1567-73. In that study it was concluded that "warnings do not seem significantly to help the suspect to make a 'free and informed choice to speak or assert his right to stand silent.'" *Id.* at 1578 (quoting *Miranda,* 384 U.S. at 467-68). The same conclusion was reached when the subjects of the warnings were students and professors at Yale charged with draft dodging. Griffiths & Ayres, *supra* note 28, at 318. It was determined that without "preparatory infusion . . . the *Miranda* warnings are almost wholly ineffective, and this obtains even when the suspect is intelligent, and the interrogation is polite, noncustodial, and at the suspect's home." *Id.* As in the study conducted in Washington, D.C., the warning-waiver form used at Yale did not include the ambiguous language of an in futuro warning. *Id.* at 304 n.10.

[48] *See Interrogations in New Haven: The Impact of Miranda, supra* note 37, at 1568 (when unclear warnings were used police were more successful in obtaining evidence and more confessions were given).

[49] *Id.* at 1614-15.

evidence, which consisted of a signed waiver form identical to the one used in *Harrell,* was not sufficient to establish a valid waiver. The court reasoned that the form was not conducive to an intelligent waiver on the ground that the warning incorporated in it failed to inform the accused of his rights.[50] This reasoning was not even noted in *Harrell,* much less refuted.

Thus, it is plausible that the validation of the warning and police tactics in *Harrell* contravened the objectives of *Miranda.* It is therefore necessary to scrutinize carefully the reasoning and precedent relied upon by the *Harrell* court.

To support its approval of in futuro warnings the Mississippi Supreme Court has consistently relied upon the Fifth Circuit opinion in *Mayzak v. United States.*[51] However, the issue addressed in *Mayzak* was significantly different from that raised in the *Harrell* line of cases. Rather than testing the validity of a *Miranda* warning, as was the case in *Harrell,* the *Mayzak* court focused on the question of whether an accused was entitled to the tender of counsel concurrent with the reading of his rights.[52] The court ruled that immediate tender of counsel need not accompany otherwise sufficient warnings.[53] The *Mayzak* court was thus concerned with delineating what a suspect's rights are rather than with describing the proper procedure by which he is apprised of those rights, and clearly excluded from the scope of its decision the kind of issues raised in *Harrell.*[54] The Mississippi Supreme

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[50] Gilpin v. United States, 415 F.2d 638, 641 (5th Cir. 1969).

[51] 402 F.2d 152 (5th Cir. 1968); *see* Burge v. State, 282 So. 2d 223, 226 (Miss. 1973) (citing *Mayzak* as precedent for the validation of in futuro warnings), *cert. denied,* 415 U.S. 985 (1974); Evans v. State, 275 So. 2d 83, 86 (Miss. 1973) (quoting extensively from *Mayzak).* Other jurisdictions have also found in *Mayzak* precedent for validating in futuro warnings. *See, e.g.,* Klinger v. United States, 409 F.2d 299 (8th Cir.), *cert. denied,* 396 U.S. 859 (1969); Schade v. State, 512 P.2d 907, 915 (Alaska 1973); State v. Maluia, 56 Haw. 428, 529 P.2d 1200, 1206 (1975).

[52] 402 F.2d at 155. The court noted:

> There is no doubt that [the accused] was warned of his right to have court appointed counsel and to have such counsel present prior to and during any questioning. Rather we are asked to find that the *sufficiency* of a *Miranda* warning is diluted or destroyed because the promise of an attorney is not accompanied by a concurrent tender of one.

Id. (emphasis added). The warning in *Mayzak* specifically informed the accused "that he had a right to . . . court appointed counsel prior to and during any questioning." *Id.* at 153. The warning in *Harrell* omitted that declaration. See text accompanying note 9 *supra.*

[53] 402 F.2d at 155.

[54] The Fifth Circuit concluded that the facts in *Mayzak* were outside the ambit of

Court, however, has failed to recognize the qualitative difference in emphasis between *Harrell* and *Mayzak*.[55]

The basis for the holding in *Harrell* may be traced to the Fifth Circuit decision in *United States v. Lacy*.[56] The *Lacy* opinion is considered the cornerstone of the rationale that a warning of an in futuro right to appointed counsel is not damaging if a suspect is also informed that he may remain silent until counsel is made available.[57] As in *Gilpin*, the *Lacy* court had to determine the validity of a warning identical to the one used in *Harrell*.[58] However, the *Lacy* panel concluded that the warning was adequate.[59] The court reasoned that the fact "[t]hat the attorney was not to be appointed until later *seems* immaterial since [the accused] was informed that he had the right to put off answering any questions until the time when he did have an appointed attorney."[60] This reasoning is questionable, however, in light of its incompatibility with the decision in *Gilpin*.

It is intriguing that both *Lacy* and *Gilpin* cited *Lathers v. United States*[61] as support for opposite conclusions.[62] In *Lathers* the police informed the accused that "if he was unable to hire an attorney the Commissioner or the Court would appoint one for

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Fendley v. United States, 384 F.2d 923 (5th Cir. 1967). 402 F.2d at 155. In *Fendley* the accused was told that " 'if he did not have any money to obtain an attorney that the Judge, the Court, would appoint one for him when he went to court.' " 384 F.2d at 923. The court stated that the accused had not been "advised, as *Miranda* requires, of his right to have *court appointed* counsel present *during the interrogation*." *Id.* at 923-24 (emphasis in original). Since the warning involved in *Fendley* was almost identical to that used in the *Harrell* line of cases, it is clear that *Mayzak* was not correctly cited by the Mississippi Supreme Court as providing support for in futuro warnings.

[55] *See* Harrell v. State, 357 So. 2d at 645 (quoting Burge v. State, 282 So. 2d at 226).

[56] 446 F.2d 511 (5th Cir. 1971).

[57] For a discussion of the significance of the *Lacy* decision for jurisdictions validating in futuro warnings see Note, *supra* note 4, at 963. The Mississippi Supreme Court cited *Lacy* for support in Holifield v. State, 275 So. 2d 851, 855 (Miss. 1973).

[58] 446 F.2d at 512-13.

[59] *Id.* at 513.

[60] *Id.* (emphasis added).

[61] 396 F.2d 524 (5th Cir. 1968).

[62] The *Gilpin* court cited *Lathers* for the proposition that a warning must " 'effectively convey to the accused that he is entitled to a government-furnished counsel here and now.' " 415 F.2d at 641 (quoting *Lathers*, 396 F.2d at 535). The *Lacy* court, on the other hand, cited *Lathers* as requiring that the defendant be informed that: "(a) he had the right to the presence of an attorney and (b) that the right was to have an attorney 'before he uttered a syllable.' " 446 F.2d at 513.

him."[63] The court held that this warning failed to "lay out in clear terms the extent of [the accused's] rights."[64] The Fifth Circuit intimated that a warning must convey to the accused that he has a right to appointed counsel before questioning.[65] Most significantly, the court concluded that "[i]f the words are subject to the construction that . . . counsel will be available only in the future, *Miranda* has not been obeyed. Although there is no talismanic or heraldic abracadabra which must be fulfilled, the offer of counsel must be clarion and firm, not one of mere impressionism [*sic*]."[66]

Nevertheless, the *Lacy* court believed that the potential harm associated with in futuro warnings was effectively neutralized by an additional warning of the right to remain silent until speaking with a lawyer,[67] a warning not given to the accused in *Lathers*. On this basis, *Lacy* and *Lathers* may be distinguished factually. That *Lathers* was cited in *Gilpin* as precedent for invalidating a warning identical to the one given in *Lacy*[68] demonstrates the futility of any attempt to reconcile the cases. Indeed, the short per curiam opinion in *Lacy* appears to be an insupportable aberration when compared with the more thoroughly reasoned and consistent decisions in *Lathers* and *Gilpin*.

The misplaced reliance upon *Mayzak* and the dubious precedential value of *Lacy* reduce to a great extent the cogency of the Mississippi Supreme Court's decision in *Harrell*. More precise and discriminative analysis than is found in the *Harrell* opinion is needed to resolve disputes involving fifth and sixth amendment

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[63] 396 F.2d at 533.

[64] *Id.* at 535.

[65] *Id.*

[66] *Id.* The *Lathers* court, *id.* at 535 n.10, cited the warning in Hodge v. United States, 392 F.2d 552 (5th Cir. 1968), as an example of a proper warning:

> Before we ask you any questions, you must understand your rights. You have a right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. *If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish.* If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Id. at 554 n.2 (emphasis added).

[67] *See generally* Note, *supra* note 4, at 963.

[68] See note 57 and accompanying text *supra*.

rights. Tenuous reasoning and questionable precedent add no credibility to the argument of the *Harrell* court that in futuro warnings of the right to appointed counsel, when coupled with a warning of the right to remain silent until speaking with an attorney, comport with the constitutional mandates set out in *Miranda*.[69]

Although the Mississippi Supreme Court has in the past called for the abandonment of in futuro warnings,[70] police response to the appeal has been lethargic. Strict application of the exclusionary rule to statements elicited subsequent to such warnings would, perhaps, oblige police to adopt more lucid language in the future.[71] The risk of confusion concomitant with in futuro

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[69] Other arguments supporting the validity of in futuro warnings have been made. First, it has been reasoned that since no specific words are required by *Miranda* and since the crucial test is whether the words are understood by the accused, in futuro warnings that meet this test are sufficient. *See* Rowbotham v. State, 542 P.2d 610, 619 (Okla. 1975) (validated a warning of the type given in *Harrell*), *vacated on other grounds*, 428 U.S. 907 (1976). Language supporting this logic is found in Coyote v. United States, 380 F.2d 305, 308 (10th Cir.), *cert. denied*, 389 U.S. 992 (1967). However, *Coyote* did not deal with an in futuro warning; in fact, when the Tenth Circuit tested a warning very similar to that in *Harrell* it was held invalid. *See* United States v. Oliver, 421 F.2d 1034, 1037 (10th Cir. 1970) (invalid warning stated in part: "You may have an attorney appointed by the U.S. Commissioner or the court to represent you if you cannot afford or otherwise obtain one.").

Secondly, some courts have examined the condition and nature of the accused in validating in futuro warnings. *See* United States v. Carneglia, 468 F.2d 1084, 1091 (2d Cir. 1972) (accused had retained counsel), *cert. denied*, 410 U.S. 945 (1973); United States v. Potter, 360 F. Supp. 68, 70 (E.D. La. 1973) (accused was not a newcomer to criminal law and procedure), *aff'd*, 490 F.2d 991 (5th Cir. 1974).

Thirdly, the Supreme Court's approval in *Miranda* of FBI warnings that did not mention expressly the immediate right to appointed counsel, 384 U.S. at 486-87, has been adduced to support the validity of in futuro warnings. Young v. Warden, Maryland Penitentiary, 383 F. Supp. 986, 1005 (D. Md. 1974), *aff'd mem.*, 532 F.2d 753 (4th Cir.), *cert. denied*, 425 U.S. 980 (1976); State v. Maluia, 56 Haw. 428, 539 P.2d 1200, 1206 (1975). The FBI has since rejected in futuro warnings. *See* United States v. Cassell, 452 F.2d 533, 541 n.8 (7th Cir. 1971). For discussion of these arguments see Note, *supra* note 4, at 962-65.

[70] See note 14 and accompanying text *supra*.

[71] Without applying the exclusionary rule, judicial influence upon police behavior will not be substantial. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, TASK FORCE REPORT: THE POLICE 198 (1967). The exclusionary rule is based on the assumption that police act in a way that is advantageous rather than "out of a desire to follow the law." Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1221 (1971). It has been pointedly stated that:

> [T]he predominant incentive for interrogation is to obtain evidence for use in court. Consequently, police conduct in this area is likely to be responsive to judicial rules governing the admissibility of that evidence. "There can be no doubt," the President's Crime Commission reported, that the Supreme Court's

warnings cannot be tolerated in a judicial system touted for its promotion of procedural equality.

B. Procedural Safeguards for "Capital Crimes"

In *Furman v. Georgia,*[72] the United States Supreme Court held that the imposition of the death penalty for certain crimes constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution of the United States.[73] Consequently, the status of various Mississippi statutes and constitutional provisions containing the phrases "capital offense" or "capital crimes" was left in a state of uncertainty.[74] In *Hudson v. McAdory,*[75] for example, the appellant contended that since the infliction of the death sentence for murder constituted cruel and unusual punishment in violation of the eighth amendment, the prohibition on granting bail for capital offenses contained in article 3, section 29 of the Mississippi Constitution of 1890[76] was thereby nullified because capital offenses no longer existed.[77] The Mississippi Supreme Court noted that

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rulings about interrogation procedures "had much to do with the fact that today the third degree is almost nonexistent."

Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 722 (1970) (quoting REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967)); *see* J. WILSON, VARIETIES OF POLICE BEHAVIOR 48 (1968) (interrogation procedure is easy to bring under judicial control).

[72] 408 U.S. 238 (1972).

[73] *Id.* at 239-40.

[74] The terms "capital case," "capital offense," and "capital crime" appear in the following sections of the Mississippi code: MISS. CODE ANN. § 13-5-73 (oaths of jurors and bailiffs in capital cases); *id.* § 13-5-77 (special venire facias to issue in certain criminal cases); *id.* § 97-1-7 (attempt to commit offenses—punishment); *id.* § 99-15-17 (compensation of counsel—amount); *id.* § 99-15-27 (copy of indictment and special venire served to be given in capital cases); *id.* § 99-15-43 (change of venue—capital cases); *id.* § 99-15-47 (joint indictments—severance in felonies); *id.* § 99-17-3 (peremptory challenges—number allowed); *see Ex parte* Dennis, 334 So. 2d 369, 372 (Miss. 1976). "Capital offenses" also appears in article 3, § 29 of the Mississippi Constitution, which provides: "Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for *capital offenses* when the proof is evident or presumption great." MISS. CONST. art. 3, § 29 (emphasis added).

[75] 268 So. 2d 916 (Miss. 1972).

[76] MISS. CONST. art. 3, § 29.

[77] 268 So. 2d at 918. The primary reason for denying bail in capital cases was that pretrial incarceration was necessary to secure the accused's presence at trial since it was thought that an accused would forfeit his bond and flee rather than risk a death sentence. *Ex parte* Dennis, 334 So. 2d 369, 371 (Miss. 1976). According to the court in *Dennis,* bail

historically the term "capital offense" has denoted an offense punishable by death.[78] The court determined, however, that it was necessary to retain the classifications "capital offenses" and "capital crimes" so that chaos and confusion would not result from the abolition of the death penalty in certain categories of crimes.[79] The *Hudson* court concluded that the proper approach was to retain the designation of a capital offense as any crime for which the permissible punishment prescribed by the legislature was death, even though the penalty may not be imposed because of the *Furman* decision.[80]

In 1974, the Mississippi Legislature enacted the present section 1-3-4 of the Mississippi code, which declares that the terms "capital offense" and "capital crime" when used in any statute shall refer to offenses and crimes punishable by death or life imprisonment.[81] Subsequently, in *Ex parte Dennis,*[82] the court addressed the question of whether one accused of armed robbery was entitled to bail under section 29 of the Mississippi Constitution of 1890.[83] Prior to *Furman* and *Hudson* the armed robbery statute had included the death penalty;[84] but in 1974 Mississippi

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was justified because its denial punished the accused prior to a guilty verdict while the accused is presumed innocent until proven guilty. *Id.*

[78] 268 So. 2d at 922.

[79] *Id.* at 921. The *Hudson* court noted, for example, that if the term "capital offenses" were nullified, the logical conclusion would be that the number of peremptory challenges prescribed by § 2520, Mississippi code of 1956 (presently codified at MISS. CODE ANN. § 99-17-3 (1972)), would be reduced from twelve to six, thus taking away a valuable right. 268 So. 2d at 920. The court also observed that § 1795 of the 1956 Mississippi code (presently codified at MISS. CODE ANN. § 13-5-77 (1972)) provides that any person charged with a capital crime or with the crime of manslaughter is entitled to a special venire. If after *Furman* capital crimes were held to be only those for which the death penalty could be inflicted, consistency would require that the court deprive a defendant of the right of a special venire in cases formerly capital, but grant a special venire if the charge were the lesser offense of manslaughter. 268 So. 2d at 920.

[80] 268 So. 2d at 923.

[81] MISS. CODE ANN. § 1-3-4 (Supp. 1978) provides:

> The terms "capital case," "capital cases," "capital offense," "capital offenses," and "capital crime" when used in any statute shall denote criminal cases, offenses and crimes punishable by death or imprisonment for life in the state penitentiary. The term "capital murder" when used in any statute shall denote criminal cases, offenses and crimes punishable by death or imprisonment for life in the state penitentiary.

[82] 334 So. 2d 369 (Miss. 1976).

[83] MISS. CONST. art. 3, § 29.

[84] 334 So. 2d at 372.

lawmakers eliminated the death penalty for armed robbery by enacting the present section 97-3-79.[85] Applying the rule expressed in *Hudson*,[86] the court concluded that by enacting section 1-3-4 the legislature had not altered the meaning of "capital offenses," and that since armed robbery was no longer punishable by death, article 3, section 29 of the Mississippi Constitution could not be interpreted as precluding bail for one accused of that crime.[87]

Equipped with this judicial precedent, the Mississippi Supreme Court in *Wilburn v. State*[88] considered whether certain procedural safeguards[89] accorded those accused of "capital offenses" should be retained although those offenses were no longer punishable by death.[90] The defendant in *Wilburn*, convicted of rape, had been denied requests for a special venire[91] and for twelve peremptory challenges.[92] The court determined that by

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[85] MISS. CODE ANN. § 97-3-79 (Supp. 1978).

[86] See notes 75 through 80 and accompanying text *supra*.

[87] 334 So. 2d at 373. In *Dennis*, the court emphasized that the legislature had no authority to amend the constitution by redefining the term "capital offenses" found in article 3, § 29. *Id.* According to the court, the meaning of "capital offenses" was clear and unambiguous when the Mississippi Constitution of 1890 was authored. Relying on *Ex parte* Fortenberry, 53 Miss. 428 (1876), the court declared that the term at that time referred only to an offense that permitted the death penalty. 334 So. 2d at 373. It is interesting to note that in *Hudson*, a case relied upon in the *Dennis* decision, the court held that the Constitution of Mississippi "neither defines the term 'capital offenses' appearing in Section 29 thereof, nor prescribes the punishment for these or any other crimes; therefore, the designation of 'capital offenses' was left to the Legislature." 268 So. 2d at 922. If this reasoning had been followed in *Dennis*, the result would have been different.

[88] 356 So. 2d 1173 (Miss. 1978).

[89] The statutes that provide certain procedural safeguards in "capital cases" are enumerated in note 74 *supra*.

[90] 356 So. 2d at 1173.

[91] *Id.* MISS. CODE ANN. § 13-5-77 (1972) provides in part:

> When any person charged with a capital crime, or with the crime of manslaughter, shall have been arraigned and the plea of not guilty entered, it shall be the duty of the court, upon the demand of the accused or the district attorney, to cause to be drawn, in open court, from the jury-box as many names as the judge in his discretion may direct, not to be less than forty, and it shall be the duty of the clerk to issue a special venire facias, commanding the sheriff to summon the persons whose names are so drawn, to attend the court on a particular day to be named in the writ.

[92] 356 So. 2d at 1173. MISS. CODE ANN. § 99-17-3 (1972) provides: "In capital cases the defendant and the state shall each be allowed twelve peremptory challenges. In cases not capital the accused and the state each shall be allowed six peremptory challenges . . . ."

enacting section 1-3-4 the legislature had intended to preserve the procedural safeguards in all cases where the maximum sentence was life imprisonment as well as in those where the offense was punishable by death.[93] Therefore, all statutory procedural safeguards found within laws pertaining to "capital" crimes or offenses were held to be currently in effect even though the death penalty had been removed from such offenses as kidnapping, forcible rape and armed robbery.[94]

A thorough analysis of the three Mississippi decisions considered in this section leads inevitably to confusion. A common thread may be found in these cases only by substituting the dissenting opinion of Justice Walker in *Dennis*[95] for the majority opinion in that case. Justice Walker reasoned that the authors of the Mississippi Constitution had intended that the term "capital offense" as used in section 29[96] refer as much to the gravity of the offense as to whether the offense was punishable by death.[97] He concluded that since the classification of a crime as a capital offense was a proper legislative function, one accused of armed robbery should be denied bail in light of section 1-3-4 of the Mississippi code and article 3, section 29 of the Mississippi Constitution of 1890.[98] On the basis of the majority opinions in the three cases, however, there appears to be one definition for the term "capital offenses" found in section 29 of the Mississippi Constitution and a separate definition for "capital" crimes or offenses when those terms appear in statutes.

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[93] 356 So. 2d at 1176.

[94] *Id.*

[95] 334 So. 2d at 374-76 (Walker, J., dissenting).

[96] MISS. CONST. art. 3, § 29.

[97] 334 So. 2d at 375 (Walker, J., dissenting).

[98] *Id.*

[99] *See* Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 COLUM. L. REV. 18, 18-20 (1916) (tracing the early right to be present). Concerning this right, the Supreme Court has stated: "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 372 (1892); *see* Illinois v. Allen, 397 U.S. 337, 338 (1970) (confrontation clause guarantees the right to be present at every stage); Diaz v. United States, 223 U.S. 442, 455 (1912) (in felony cases right to be present is scarcely less important than trial itself); Hopt v. Utah, 110 U.S. 574, 576-79 (1884) (presence is essential for protection of one whose life or liberty is involved). In Mississippi it has been held that the trial record must show affirmatively that the accused was present pending the trial. Dyson v. State, 26 Miss. 362, 383 (1853).

C. *Trial in the Defendant's Absence*

The right of criminal defendants to be present at their trial is firmly established. Under early Anglo-Saxon law the presence of the accused was considered a jurisdictional prerequisite to the obtaining of a valid conviction since defendants were not entitled to an attorney and punishment for even trivial crimes was often quite severe.[99] Indeed, it has been said that at common law defendants have a "privilege of presence."[100] This right or privilege has been preserved by the confrontation clause of the sixth amendment[101] and the due process clause of the fourteenth.[102] Moreover, most jurisdictions require either by statute or judicial precedent that defendants be personally present at their trial proceedings.[103]

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[100] Bustamante v. Eyman, 456 F.2d 269, 272 (9th Cir. 1972) (citing Snyder v. Massachusetts, 291 U.S. 98 (1934)).

[101] U.S. CONST. amend. IV provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." The Supreme Court has continually noted that "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338 (1970); Lewis v. United States, 146 U.S. 370, 373 (1892). *See generally* Comment, *Criminal Law: The Right of Confrontation v. The Right to Conduct a Trial,* 24 OKLA. L. REV. 72, 72 (1971); 59 KY. L.J. 489, 490 (1970).

This amendment was recognized in Pointer v. Texas, 380 U.S. 400 (1965) as obligatory on the states through the fourteenth amendment. *Id.* at 406. Furthermore, the right to confront witnesses has been widely incorporated in state constitutions and statutes. *See* MISS. CONST. art. 3, § 26. For an extensive list of state jurisdictions adopting the right of confrontation in their laws see Murray, *The Power to Expel a Criminal Defendant From His Own Trial,* 36 U. COLO. L. REV. 171, 172 nn.4 & 5 (1964).

[102] *See* Bustamante v. Eyman, 456 F.2d 269, 273 (9th Cir. 1972) (right of presence at trial is founded on confrontation and due process clauses).

[103] For a list of these jurisdictions see Murray, *supra* note 101, at 172-73 nn.6-8. FED. R. CRIM. P. 43 provides: "(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." The stage of the proceedings at which the defendant must be present varies among jurisdictions. For detailed classifications of the jurisdictions see Murray, *supra* note 101, at 172-73 nn.6-8. Federal rule 43 does not apply to hearings on motions made prior to or after trial. *See* United States v. Lynch, 132 F.2d 111, 113 (3d Cir. 1942) (right exists throughout trial but not before or afterwards).

In Mississippi the defendant must be present "in all material and important steps." Rolls v. State, 52 Miss. 391, 396 (1876); *see* Thames v. State, 221 Miss. 573, 579, 73 So. 2d 134, 137 (1954) (required presence during "progress of the trial"). The Mississippi defendant need not be present when a special venire is drawn. Kendall v. State, 249 So. 2d 657, 658-60 (Miss. 1971), *cert. denied,* 404 U.S. 1040 (1972). However, a hearing on the motion of defense counsel for permission to withdraw is deemed a crucial stage of the case and the defendant's presence is required. Myers v. State, 254 So. 2d 891, 892-93 (Miss. 1971). It is well-established that waiver of the right to be present is allowed at the verdict

However, if a defendant in a noncapital case voluntarily absents himself after the trial has begun in his presence, he will be considered to have waived his right to be present.[104] Thus, it is generally held that if a defendant was present at the commencement of his trial,[105] the proceedings may continue despite his voluntary absence at a later stage.[106]

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stage of felony cases. *See generally* 23 A.L.R.2d 473 (1952). The Mississippi Supreme Court originally limited that rule to noncapital cases. Sherrod v. State, 93 Miss. 774, 778, 47 So. 554, 555 (1908). The court reversed this position in Thomas v. State, 117 Miss. 532, 545-46, 78 So. 147, 149-50 (1918), but declined to overrule *Sherrod* specifically. *Id.* at 548, 78 So. at 150.

[104] *See* Diaz v. United States, 223 U.S. 442, 455 (1912) (voluntary absence does not "nullify what has been done or prevent completion of the trial"); Berness v. State, 83 So. 2d 613, 616-17 (Ala. 1953) (presence not required if clear and unequivocal waiver); State v. Utecht, 36 N.W.2d 126, 128-29 (Minn. 1949) (wilful wrong of defendant in absenting and concealing himself during trial should not be allowed to defeat justice); Scott v. State, 204 N.W. 381, 381 (Neb. 1925) (failure to attend is a waiver); Trombley v. Langlois, 163 A.2d 25, 28 (R.I. 1960) (right of presence is a privilege that noncapital defendant may assert or waive). *But see* Booze v. State, 290 P.2d 261, 266 (Okla. 1964) (right of presence cannot be waived); Boner v. Boles, 137 S.E.2d 418, 424 (W. Va. 1964) (right of presence is inalienable). FED. R. CRIM. P. 43 provides:

> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present, (1) voluntarily absents himself after the trial has commenced
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> . . . .

[105] Waiver is not applicable unless the defendant was present when the trial commenced, thus giving the court jurisdiction over his person. 8b J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 43.02, at 43-10 & 43-11 (rev. 2d ed. 1978).

[106] Application of this rule depends in some jurisdictions upon whether the defendant has been charged with a capital or noncapital offense. Mississippi is among the jurisdictions that do not distinguish between capital and noncapital trials. *See* Thomas v. State, 117 Miss. 532, 542-45, 78 So. 147, 148-49 (1918) (statutory allowance of waiver does not distinguish between felonies and capital felonies). Other jurisdictions, however, recognize waiver only in noncapital cases. *See* Berness v. State, 83 So. 2d 613, 616-17 (Ala. 1955) (presence not required in noncapital cases); Scott v. State, 204 N.W. 381, 381 (Neb. 1925) (fleeing while out on bail is waiver of right to be present in noncapital trials); Trombley v. Langlois, 163 A.2d 25, 28 (R.I. 1960) (right to be present is a privilege in noncapital cases that the accused may assert or waive). The United States Supreme Court at one time stated that presence during a trial for a capital offense was so fundamental that it could not be waived. Diaz v. United States, 223 U.S. 442, 455 (1912). In Illinois v. Allen, 397 U.S. 337, 345 (1970), however, the Supreme Court noted that the threat of relatively mild sanctions against those facing a possible death sentence was of little effect. *Id.* at 345. Federal rule 43 was amended in 1975 to comply with recommendations of the Supreme Court that the right to be present in capital cases be made waivable. H.R. REP. No. 247, 94th Cong., 1st Sess. 18, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 674, 690. For further discussion of the differences among jurisdictions see Murray, *supra* note 101, at 173 nn.9 & 10; 59 KY. L.J. 489, 491 & nn.14 & 15 (1970).

Mississippi's position on this issue was expressed in the recent case of *McMillian v. State.*[107] The defendant in *McMillian,* charged with murder, absconded while on bail during a recess after voir dire of the jury.[108] After waiting thirty-five minutes for the defendant's return, the trial court overruled an objection by defense counsel that the defendant's presence was required, and proceeded without the defendant. The defendant was recaptured and returned to the courtroom in time to be present when the jury rendered a guilty verdict.[109] On appeal, the conviction was contested on the ground that the trial court had erred in proceeding without the defendant.[110] Affirming the conviction, the Mississippi Supreme Court concluded that the defendant had voluntarily waived his right to be present, and held that the trial judge had used proper discretion in continuing the trial in the defendant's absence.[111]

To reach this conclusion the court relied heavily on section 99-17-9 of the Mississippi code, according to which a felony case may proceed despite the absence of the defendant provided he is "in custody and consenting thereto."[112] The court reasoned that

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[107] 361 So. 2d 495 (Miss. 1978).

[108] *Id.* at 496. At the time of the trial, February 7, 1974, there was no death penalty in Mississippi. *Id.* at 496. The death penalty had been invalidated in 1972. Capler v. State, 268 So. 2d 338, 339-40 (Miss. 1972). New legislation authorizing the imposition of the death penalty, MISS. CODE ANN. § 97-3-19 (Supp. 1978), was not enacted until April 23, 1974. Thus, in February of 1974, the only punishment for murder was life imprisonment.

[109] 361 So. 2d at 496.

[110] *Id.* at 496-97. Essentially, the defendant contended that since he had been charged with a capital offense he could not waive his right to be present. He failed to argue that the receiving of testimony in his absence violated his sixth amendment right of confrontation. Brief for Appellant at 4-6, McMillian v. State, 361 So. 2d 495 (Miss. 1978). McMillian did not, however, face the possibility of a death penalty. Even if it had been a capital case, McMillian still could have waived his right of presence under Mississippi case law. *See* Thomas v. State, 117 Miss. 532, 542, 78 So. 147, 148-49 (1918) (no distinction between felonies and capital felonies).

[111] 361 So. 2d at 496-97 (construing MISS. CODE ANN. § 99-17-9 (1972)).

[112] MISS. CODE ANN. § 99-17-9 (1972) provides in pertinent part:

> In criminal cases the presence of the prisoner may be waived, and the trial progress, at the discretion of the Court, in his absence, if he be in custody and consenting thereto. If the defendant, in cases less than felony be on recognizance or bail or have been arrested and escaped, or have been notified by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or be in any way in default for the non-appearance the trial may progress at the discretion of the Court, and judgment final and sentence be awarded as though such defendant were personally present in Court.

since the defendant had been present at the commencement of the trial he was "in custody" at the time he voluntarily left, although technically he was free on bail.[113]

By definition, a person "in custody" cannot control his physical presence at or absence from a particular place. For this reason, the United States Supreme Court has held that one in custody cannot waive his right to be present at trial proceedings.[114] Nevertheless, the *McMillian* court did not adopt a literal interpretation of the custody requirement. Instead, it intimated that presence at the commencement of a trial satisfies the statutory requirement of custody.

Section 99-17-9 also requires that the defendant consent to the trial's continuing in his absence.[115] Although the court in *McMillian* did not specifically address the issue of consent, it apparently inferred from the defendant's voluntary absence that he had consented to the trial's proceeding without him. Such an inference is consistent with the court's interpretation of the custody requirement: if a person's absence does not substantially affect the question of whether he is in custody, neither should it affect the question of his consent. The controlling issue in this context is whether the defendant's absence from court was voluntary.[116] In effect, the statutory requirements of custody and consent have been supplemented by the single requirement of voluntariness.

D. Correcting Inaccuracies of Voir Dire

That a defendant is entitled to a trial by an impartial jury of his peers is an old and accepted doctrine of criminal law.[117]

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[113] 361 So. 2d at 497.

[114] Diaz v. United States, 223 U.S. 442, 455 (1912).

[115] MISS. CODE ANN. § 99-17-9 (1972).

[116] In instances where the defendant's absence has not been voluntary the court has refused to find a waiver. *See* Jones v. State, 204 Miss. 284, 286, 37 So. 2d 311, 311 (1948) (sickness prevented defendant's presence, therefore, no waiver); Corbin v. State, 99 Miss. 486, 492, 55 So. 43, 44 (1911) (no waiver since defendant would have risked serious injury to her health if she had been present).

[117] U.S. CONST. amend. IV provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed." MISS. CONST. art 3, § 26 provides that "[i]n all criminal prosecutions the accused shall have a right to . . . a speedy and public trial by an impartial jury."; *see* Adams v. State, 220 Miss. 812, 815-16, 72 So. 2d 211, 213 (1954) (constitutional right to impartial jury is foundation of our form of government).

Indeed, the primary objective of impanelling a jury is the protection of a defendant's right to gather an impartial body of jurors.[118] To effect this end, the Mississippi code allows defense counsel full latitude during voir dire to search the minds and consciences of those to whom the fate of a defendant will be ultimately entrusted,[119] and requires that prospective jurors take an oath and be sworn in.[120] Defense counsel is also permitted to challenge jurors either peremptorily or for cause after noting their responses to questions propounded during voir dire.[121]

These safeguards, however, do not guarantee impartiality. Prospective jurors must answer questions put to them on voir dire honestly and accurately if challenges by defense counsel are to be exercised effectively.[122] Formal oaths neither deter the dishonest from answering questions dishonestly, nor ensure accurate answers from those incapable of understanding the questions. Impartiality may thus be jeopardized if prospective jurors, otherwise subject to successful challenges, are impanelled because they failed to answer honestly or accurately questions propounded on voir dire. Remedies available to the defendant in such situations depend upon the extent to which guilty verdicts have been tainted by the presence of jurors with previously undisclosed prejudices.

It has long been established in civil cases in Mississippi that

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[118] Head v. State, 44 Miss. 731, 750 (1870).

[119] MISS. CODE ANN. § 13-5-69 (1972); *see* Jones v. State, 133 Miss. 684, 712, 98 So. 150, 155 (1923) (court noted the importance to defendant of searching a juror's mind).

[120] MISS. CODE ANN. § 13-5-79 (1972) provides that "[a]ny person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case." Likewise, *id.* § 13-5-71 provides that petit jurors must be sworn in as follows:

> "You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, during the present term, and true verdicts give according to the evidence. So help you God."

In capital cases the jurors must swear to " 'well and truly try the issue between the state and the prisoner, and a true verdict give according to the evidence and the law.' " *Id.* § 13-5-73.

[121] In capital cases the defendant and the state are each allowed twelve peremptory challenges. In noncapital cases six peremptory challenges are allowed. *Id.* § 99-17-3. "Defendants tried jointly . . . [are] entitled to only the number to which one defendant is entitled." *Id.* § 99-17-5.

[122] *See* Jones v. State, 133 Miss. 684, 712, 98 So. 150, 155 (1923) (emphasizing the need for attorneys to understand jurors to be capable of effectively challenging them).

if a prospective juror fails, upon being asked on voir dire, to reveal a relationship he has with a party in interest the verdict will be set aside and a new trial granted.[123] The Mississippi Supreme Court has stated that it would be "unfair for a related juror to sit in a case, unless that relationship was fully disclosed, and the parties to the suit voluntarily accepted the juror."[124]

In 1978, the Mississippi Supreme Court addressed the issue in the context of a criminal case. In *Odom v. State,*[125] a juror had failed, upon being questioned on voir dire, to reveal that he was the brother of a police officer who had been involved in the investigation of the charged offense. After the trial, defense counsel learned of the omission.[126] At the hearing for a new trial defense counsel stated that if the disputed juror had revealed his relationship a peremptory challenge would have been interposed.[127] Appealing the denial of a new trial, the defendant contended that the juror's lack of candor had prevented an intelligent exercise of his peremptory challenges.[128] Since it was clear that the juror's omission had adversely affected the defendant's rights, the court inquired "whether [the defendant] must demonstrate prejudice resulting from such impairment before he is entitled to a new trial."[129]

While noting that each case must be determined on an ad hoc basis, the court set down guidelines for trial courts to follow in analyzing the propriety of granting a new trial. The court stated:

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[123] Mississippi Pub. Serv. Co. v. Collier, 183 Miss. 271, 281-82, 183 So. 379, 380-81 (1938); Davis v. Searcy, 79 Miss. 292, 293-94, 30 So. 823, 824 (1901). In *Collier,* it was discovered after the trial that a juror was the second cousin of one of the defendants. 183 Miss. at 281, 183 So. at 380. Noting that such a relationship was prejudicial, that evidence showed the disputed juror had taken an active role in the jury room and that the trial judge was in the best position to determine whether the plaintiff had in fact been prejudiced, the court affirmed the granting of a new trial. *Id.* at 282, 183 So. at 380-81. In *Davis,* two jurors failed to disclose that they were related to the defendant. The court concluded that this fact alone necessitated reversal of the judgment, which had been rendered for the defendant. 79 Miss. at 293-94, 30 So. at 824.

[124] 183 Miss. at 282, 183 So. at 381.

[125] 355 So. 2d 1381 (Miss. 1978).

[126] *Id.* at 1382.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 1383.

> [W]here . . . a prospective juror in a criminal case fails to respond to a relevant, direct, and unambiguous question presented by defense counsel on voir dire, although having knowledge of the information sought to be elicited, the trial court should, upon motion for a new trial, determine whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited.[130]

If these questions are answered affirmatively, the trial court must "then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond. If prejudice reasonably could be inferred, then a new trial should be ordered."[131] Applying the facts of *Odom,* the court determined that since a challenge would have been used against the policeman's brother, there was a strong inference of prejudice against the defendant.[132]

The *Odom* analysis was reiterated in two other criminal decisions in 1978. In *Dase v. State,*[133] a prospective juror failed to answer correctly when asked: " 'Have any of you or members of your immediate family ever been the victim of a crime or a violent crime?' "[134] After the trial, the defense attorney learned that the disputed juror's son had been stabbed to death one month before the trial. However, the trial court refused to grant a new trial.[135] On appeal, the state contended that *Odom* did not apply since the juror had not known that her son had been a victim of a violent crime even though she was aware that he had been stabbed.[136] Holding that *Odom* was applicable, the court reasoned that the operative fact was that the juror's omission "was inadvertent and that she did in fact think that her son was the victim of a violent crime."[137] By the *Odom* analysis it was clear that prejudice was inferable from the juror's failure to reveal the information sought and that defense counsel would have challenged

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[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] 356 So. 2d 1179 (Miss. 1978).
[134] *Id.* at 1181.
[135] *Id.*
[136] *Id.* at 1182.
[137] *Id.*

the juror had the truth come out.

The court again applied *Odom* in *Brooks v. State*,[138] a case involving a prospective juror who had not answered correctly when asked: " 'Have any of your family ever been the victim or the subject of an assault and battery, or a criminal attack on their person?' "[139] Concluding that the three questions of the *Odom* test must be answered affirmatively, the court held that prejudice to the defendant was reasonably inferable from the juror's failure to respond and ordered a new trial.[140]

Although by the *Odom* decision the court contributed significantly to the preservation of impartiality in the jury system, it neglected to address two collateral issues. First, it is not clear by what method of proof a defendant may show at his hearing on a motion for a new trial that a juror had substantial knowledge of undisclosed information when questioned on voir dire. It has been held that jurors may not testify to impeach their verdict.[141] However, if the state fails to object to the competency of a juror to testify at a hearing for a new trial, such testimony will be admissible.[142] The defendant in *Brooks* simply averred in a sworn affidavit that the disputed juror failed to reveal pertinent information.[143] This method of proof was implicitly approved by the *Brooks* court as an acceptable alternative to the taking of post-trial testimony from jurors themselves.

The second issue not considered by the court in *Odom* concerns the appropriate methods of post-trial inquiry through which defense counsel may ascertain the competency of jurors. The Mississippi Code of Professional Responsibility provides:

> After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarras *[sic]* the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after a trial with a juror, he could not ascertain if the verdict might be subject to legal chal-

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[138] 360 So. 2d 704 (Miss. 1978).

[139] *Id.* at 705.

[140] *Id.* at 706-07.

[141] Ratcliff v. Nail, 231 So. 2d 798, 800 (Miss. 1970); Index Drilling Co., Inc. v. Williams, 242 Miss. 775, 789, 137 So. 2d 525, 530 (1962).

[142] 356 So. 2d at 1181 n.1.

[143] 360 So. 2d at 705-06.

> lenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.[144]

This rule provides an adequate basis for the conclusion that defense counsel may, within the bounds of courtesy, investigate a juror's background to confirm or dispel suspicions concerning the existence of previously undisclosed biases.

II. Evidence

This past term the Mississippi Supreme Court in *Cunningham v. State*[145] reaffirmed its adherence to the co-conspirators' exception to the hearsay rule.[146] Under the exception any act done or declaration made by one co-conspirator in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided a foundation for admissibility is laid by independent proof of the conspiracy itself.[147] Thus, the three requisites for admissibility are furtherance, pendency[148] and foundation.

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[144] Miss. Code of Professional Responsibility, Ethical Consideration 7-29. Communications with members of families of jurors are subject to the same restrictions. *Id.* 7-31.

[145] 357 So. 2d 299 (Miss. 1978).

[146] The co-conspirators' exception was first articulated late in the eighteenth century in a series of treason trials involving participants in the French Revolution. *See generally* Levie, *A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule,* 52 Mich. L. Rev. 1159, 1162 (1954). The United States Supreme Court approved the exception in United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827).

[147] It has been said that this exception to the hearsay rule is justified by necessity. *See* Comment, *The Hearsay Exception for Co-Conspirators' Declarations,* 25 U. Chi. L. Rev. 530, 540 (1958). "Unless a conspirator obligingly turns state's evidence there remain only two other methods of proof, circumstantial evidence and the conspirators' own declarations." Levie, *supra* note 146, at 1160. *See generally Developments in the Law—Criminal Conspiracy,* 72 Harv. L. Rev. 920, 983-990 (1959).

[148] Pendency is said to be the actual duration of the illegal agreement. Those declarations made before the conspiracy is conceived or after its termination are inadmissible. Levie, *supra* note 146, at 1172. Declarations made after the conspiracy has ended are particularly untrustworthy because each member's interest is to avoid responsibility and shift the blame. *Id.* at 1173. There are, however, two situations in which statements made after the commission of a planned crime may be admissible. These situations involve declarations made in the furtherance of escape or concealment, *see* Watson v. State, 166 Miss. 194, 213, 146 So. 122, 127 (1932) (declarations in furtherance of a common purpose, as for escape and concealment, made after the commission of the crime held admissible), and those made by conspirators contemplating a division of profits after the commission

Cunningham involved a prosecution for murder in which the testimony of the defendant's co-conspirator asserting that another conspirator had stated prior to the robbery that they might have to kill the store owner was held admissible.[149] The court reasoned that since there was uncontroverted testimony that the defendant had actively participated in the robbery as planned, and since there was adequate proof of a conspiracy, the co-conspirator's declaration was admissible.[150]

An examination of the history of the co-conspirator's exception reveals a pattern of inconsistent application in Mississippi decisions. The court has repeatedly upheld the requirements of foundation,[151] furtherance[152] and pendency.[153]The inconsistency

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of the offense, *see* Osborne v. State, 99 Miss. 410, 422-23, 55 So. 52, 53 (1911) (in a prosecution for conspiracy to burn inventory with intent to defraud insurance company, statements made by co-conspirator after the fire but while accused was trying to obtain a settlement held admissible).

[149] The statement "we might have to kill Mr. Davis" was made while the three co-conspirators were driving around prior to the robbery and murder. 357 So. 2d at 301.

[150] *Id.* at 301.

[151] *See* Jones v. State, 189 Miss. 533, 539, 198 So. 555, 556-57 (1940) ("[I]n order to make admissible the declaration of one of the actors prior to the killing there must be proof of a conspiracy between the two to commit the unlawful act."); Browning v. State, 30 Miss. 656, 667 (1856) ("[F]oundation must first be laid by proof, sufficient in the opinion of the court to establish prima facie the existence of the combination."). *But cf.* Carr v. State, 175 Miss. 102, 106-08, 166 So. 363, 364 (1936) (where three defendants each actively participated in a homicide, one by cutting the victim several times, another by assaulting him with a stick and the other by rushing in with a razor, there was no need to prove existence of a conspiracy before acts and declarations of one of several defendants could be admitted into evidence against the other).

[152] *See* Gillum v. State, 62 Miss. 547, 552 (1885) (a declaration is not admissible unless made while doing some act in furtherance of the common purpose); Mask v. State, 32 Miss. 405, 406 (1856) (declarations and threats made by conspirator immediately before and after the homicide held admissible).

[153] *See* Sanderford v. State, 178 Miss. 705, 708-09, 174 So. 814, 815 (1937) (prosecuting attorney's statement in closing argument that the accused's co-conspirators had joined a gang and gone to parts unknown was held inadmissible in view of the rule that acts done and declarations made by one conspirator after completion or abandonment of the criminal enterprise are inadmissible as evidence against a co-conspirator); Cofer v. State, 158 Miss. 493, 498, 130 So. 511, 512 (1930) (same); Lynes v. State, 36 Miss. 617, 625-26 (1859) ("It is well-settled that even after the conspiracy has been established, admissions of co-conspirators are inadmissible to affect their associates, unless made during the progress or in furtherance of . . . the unlawful design . . . ."). These decisions are consistent with the opinion of the United States Supreme Court in Krulewitch v. United States, 336 U.S. 440 (1949), in which the Court held that declarations were inadmissible where the chief objective of the conspiracy—transportation for prostitution purposes—had ended in success or failure before the reported conversation took place. *Id.* at 442-43.

lies in the court's confusing the co-conspirators' exception to the hearsay rule with a second exception, according to which statements made and acts done by a person in the presence of the defendant, and to which the defendant assents, are admissible.[154]

As a result of this confusion, the court often requires proof that a co-conspirator's statements were made in the presence of the defendant before admitting them into evidence.[155] This is not, however, a requirement in the normal application of the co-conspirator's exception.

III. Remedies and Defenses

A. Writ of Error Coram Nobis—Antiquated Remedy?

The writ of error coram nobis has long been recognized in Mississippi as a post-conviction common law remedy that meets certain exigencies of justice.[156] The function of the writ is to bring to the court's attention some matter or fact not apparent on the

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[154] *See* Thurmond v. State, 212 Miss. 36, 42, 53 So. 2d 44, 46 (1951) ("The doctrine that accusatory statements made in the presence and hearing of the defendant are admissible as confessions implied from silence is well established in our jurisprudence as an exception to the hearsay rule."). This exception applies primarily to accusations made in the defendant's presence by a codefendant after the commission of a crime. *See, e.g.*, Bynum v. State, 242 Miss. 862, 868, 137 So. 2d 515, 516-17 (1962) (it was reversible error to permit the state to prove that the co-indictee had told officers, out of the presence of the appellant, that he and the appellant had burglarized a building); Pieper v. State, 242 Miss. 49, 51, 134 So. 2d 157, 157-58 (1961) (it was erroneous for the court to admit a statement of a co-indictee made out of the presence of the appellant); Foster v. State, 92 Miss. 257, 260-62, 45 So. 859, 860 (1908) (the declaration of a co-indictee made out of the presence of the defendant is not admissible in the separate trial of the defendant).

[155] *See, e.g.*, Grantham v. State, 167 Miss. 221, 149 So. 798 (1933) (appellants Grantham, Dunn and Bloom were jointly indicted for burglary and larceny and convicted. Witnesses testified that Grantham stated to them long after the completion of the crime and after termination of the conspiracy that he had watched while Dunn and Bloom entered the house. The court held that because this statement had not been made in the presence of Dunn and Bloom it was not competent against them. *Id.* at 223-24, 149 So. at 798; Gillum v. State, 62 Miss. 547, 552 (1885) (declarations of a conspirator held inadmissible against co-conspirator where not uttered in the presence of the latter); Mask v. State, 32 Miss. 405, 406 (1856) (declarations and threats made by one of several conspirators held admissible against fellow conspirators because the threats were made "in the presence and hearing" of such fellow conspirators).

[156] Mitchell v. State, 179 Miss. 814, 824, 176 So. 743, 745 (1937); *see* Carraway v. State, 163 Miss. 639, 643, 141 So. 342, 343 (1932) (writ of error coram nobis is of common law origin); Howie v. State, 121 Miss. 197, 220, 83 So. 158, 161 (1919) (writ of error coram nobis is recognized as a common law remedy in appropriate cases); Fugitt v. State, 85 Miss. 94, 100, 37 So. 554, 555 (1904) (writ of error coram nobis still exists at common law and may be used in proper case unless statutorily forbidden).

face of the record, the nondisclosure of which would result in a deprivation of the defendant's constitutional rights.[157] A perusal of Mississippi Supreme Court decisions, however, reveals that the remedy of coram nobis is available only in limited circumstances.[158]

For instance, the writ of error coram nobis may not as a general rule be invoked to introduce newly discovered evidence bearing on the merits of a case.[159] In *Pryor v. Woodal Industries, Inc.*[160] the court held that coram nobis is ordinarily limited to cases in which no other remedy is provided by law.[161] The motion to vacate,[162] the motion for a new trial[163] and the petition for

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[157] See note 172 *infra*.

[158] *See* Jones v. State, 346 So. 2d 376, 376-77 (Miss. 1977) (accused's allegations that he was denied appeal through fault of his counsel could not be raised in petition for writ of error coram nobis); Holloway v. State, 261 So. 2d 799, 799-800 (Miss. 1972) (petitioner not entitled to writ on ground that he was not represented by counsel at post-arrest "line-up" where there was no identification of the petitioner at the lineup); *In re* Woodruff, 253 Miss. 827, 832, 179 So. 2d 268, 269 (1965) (alleged failure of arresting officer to present arrest warrant and inform the prisoner of his right to counsel did not entitle prisoner, against whom no confession was offered or admitted, to coram nobis relief); Owens v. State, 177 Miss. 488, 508, 171 So. 345, 351 (1936) (refusing coram nobis relief to set aside verdict in murder prosecution where juror was related to the deceased by marriage was not error since juror did not know of the relationship at time of trial); Carraway v. State, 167 Miss. 390, 401, 148 So. 340, 345 (1933) (party not entitled to writ of error coram nobis where he neglected to present all the evidence at his command); Fugitt v. State, 85 Miss. 94, 103, 37 So. 554, 556 (1904) (writ cannot be invoked by showing that jurors had formed or expressed an opinion unfavorable to the accused).

[159] Lang v. State, 230 Miss. 147, 154, 92 So. 2d 670, 673 (1957); Wetzel v. State, 225 Miss. 450, 483, 76 So. 2d 194, 198 (1954); White v. State, 159 Miss. 207, 211, 131 So. 96, 96 (1930). Other cases qualify this rule to some extent by requiring at least a probability of a different result based on newly discovered evidence before the writ of coram nobis is granted. *See* Gordon v. State, 160 So. 2d 73, 75 (Miss. 1964) (writ denied unless there is a "substantial probability" that a new hearing would produce a different result); Kennard v. State, 246 Miss. 209, 212, 148 So. 2d 660, 661 (1963) (coram nobis relief granted only if the newly discovered evidence is of such nature that it would be practically conclusive that it would cause a different result).

[160] 250 Miss. 672, 167 So. 2d 920 (1964).

[161] *Id.* at 678, 167 So. 2d at 923. The court also noted that the writ is rarely used. *Id.*, 167 So. 2d at 923.

[162] *See In re* Broom, 251 Miss. 25, 30, 168 So. 2d 44, 47 (1964) (court noted that while the motion to vacate and the writ of error coram nobis are virtually equivalent, the motion is the simpler procedure); Buckler v. State, 173 Miss. 350, 358, 161 So. 683, 685 (1935) (Smith, C.J., dissenting) (writ of coram nobis is "wholly unnecessary" where all that is required is the filing of a motion to set the judgment aside).

[163] *See* Lott v. Illinois Cent. R.R., 193 Miss. 443, 447, 10 So. 2d 96, 97 (1942) ("[A] relief [having the judgment set aside] which once could be granted only on the archaic writ of error coram nobis . . . now can be granted in response to a simple motion or

appeal[164] have steadily eroded the need for invocation of the writ of error coram nobis.[165]

During the 1978 term the court in *Jones v. State*[166] was again presented the problem of determining whether the writ was proper. The defendant in *Jones* had been sentenced to life for murder.[167] He filed a petition for writ of error coram nobis, charging that his attorney had effectively deprived him of his right to appeal by making misrepresentations regarding his right to a court-appointed attorney on appeal.[168] The court held that the writ was an inappropriate remedy because the petitioner had not alleged any infirmity in the conduct of his trial.[169] The proper remedy, according to the court, was a petition for appeal accompanied by affidavits pursuant to Supreme Court Rule 38.[170]

The effect of *Jones* and prior decisions by the Mississippi Supreme Court is that a writ of error coram nobis will not be granted without proof of both a lack of a more appropriate rem-

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petition setting up the necessary facts."). *See also* Carraway v. State, 163 Miss. 639, 644, 141 So. 342, 343 (1932) (the writ of error coram nobis can be effectuated by motion or petition); Corry v. Buddendorff, 98 Miss. 98, 105, 54 So. 84, 85 (1911) ("The writ of error coram nobis has become obsolete in many of the states, and it is rarely resorted to in our own, being superseded by the more speedy remedy by motion.").

[164] See notes 113 through 115 and accompanying text *supra*.

[165] Chief Justice Smith, in Carraway v. State, 163 Miss. 639, 141 So. 342 (1932), stated:

> With us the actual issuance of the writ is unnecessary, for this court has more than once said that the relief, for the granting of which the writ of error coram nobis lies, can be granted on a motion or petition, without the issuance of the writ.
>
> This seems to be in accord with the rule in other jurisdictions . . . . The writ is now, and for a long time has been, practically obsolete in England . . . .

Id. at 644, 141 So. at 343 (citations omitted).

[166] 355 So. 2d 89 (Miss. 1978).

[167] *Id.* at 89-90.

[168] The petition stated that after his trial the defendant had been returned to jail, that his attorney did not confer with him concerning appeal, that members of his family asked the attorney about taking an appeal, that the attorney told them he would charge $3,000 to appeal, that members of his family requested the attorney to ask the court to appoint a lawyer to represent him on appeal, and that the attorney had advised members of the family that he had made the request but had been rebuffed by the court. *Id.* at 90.

[169] *Id.* (quoting Pfohl v. Pfohl, 345 So. 2d 371, 376 (Fla. 1977)).

[170] 355 So. 2d at 90. The court noted that this procedure was "designed to afford an adequate post-conviction remedy" where a person "through no fault of his own is effectively denied his right to perfect his appeal within the time prescribed by law by the acts of his attorney or the trial court." *Id.*

edy[171] and the existence of some fact unknown to the trial court that implies a deprivation of the constitutional rights to counsel and a fair trial[172] prior to conviction.[173]

B. The Defense of Voluntary Intoxication

Decisions rendered by the Mississippi Supreme Court in cases involving the defense of voluntary intoxication have been plagued by inconsistencies.[174] The rule regarding the defense has been interpreted broadly as meaning that voluntary intoxication is no defense to a crime.[175] This rule has not, however, been applied uniformly in cases involving the commission of crimes requiring a specific intent[176] by persons too drunk to form the requi-

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[171] Pryor v. Woodall Industries, Inc., 250 Miss. 672, 678, 167 So. 2d 920, 923 (1964). See notes 106 through 109 and accompanying text *supra*.

[172] *E.g.*, Nelson v. Tullos, 323 So. 2d 539, 542-43 (Miss. 1975) (writ of error coram nobis was proper remedy where indigent minor was imprisoned after failure to pay traffic fine in violation of his fourteenth amendment rights); Dunn v. Reed, 309 So. 2d 516, 517 (Miss. 1975) (accused would be entitled to writ of error coram nobis if his pleas of guilty to manslaughter and arson were made because he was incorrectly advised that he would be given the death penalty); Allred v. State, 187 So. 2d 28, 29 (Miss. 1966) (where defendant was not advised of his right to counsel, had no counsel at the time he waived preliminary hearing and was arraigned and without advice or aid of counsel pleaded guilty, he was entitled to a new trial under a writ of error coram nobis). *See also* Botts v. State, 210 So. 2d 777, 779 (Miss. 1968) ("The violation of defendant's constitutional right to be represented by counsel constitutes ground for granting a writ of error coram nobis to correct a former judgment.").

There are two other grounds upon which the trial court may issue the writ of error coram nobis after conviction: where the defendant has become insane since his conviction and imposition of sentence, or where it appears that the defendant was insane at the time of his trial and this fact was unknown to the court. *See* Wheeler v. State, 219 Miss. 129, 155, 70 So. 2d 82, 83 (1954) (applicant had become insane since conviction for murder and imposition of death sentence); Howie v. State, 121 Miss. 197, 199, 83 So. 158, 160-61 (1919) (defendant was insane at time of trial and such fact was not then known to court).

[173] *See* Jones v. State, 346 So. 2d 376, 376 (Miss. 1977) (petitioner not entitled to coram nobis relief where he only alleged an infirmity after the trial and not an infirmity in the conduct of the trial).

[174] The Mississippi Supreme Court itself noted this fact in Kendall v. State, 244 Miss. 618, 145 So. 2d 924 (1962). The court stated that "the many cases on voluntary intoxication in this and other states are candidly impossible to reconcile." *Id.* at 623, 145 So. 2d at 926.

[175] *See* Wixon v. State, 229 Miss. 430, 434, 90 So. 2d 859, 861 (1956) (voluntary drunkenness is no excuse for a crime and one cannot take advantage of a situation in which he has voluntarily placed himself by being drunk); Kelly & Little v. State, 11 Miss. (3 S & M) 518, 527 (1844) ("Legal writers, from the earliest times to the present, agree that mere drunkenness is no extenuation or excuse for crime in the view of the law."). *See generally* Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045 (1944).

[176] For example, first degree murder is generally held to require the intent to kill, and

site intent.[177] This qualification of the general rule has come to be known as the "exculpatory doctrine."[178] The practical effect of the exculpatory doctrine is that whenever "specific" intent is an essential element of a crime and no lesser cognate offense requiring only "general" intent is available, the intoxicated defendant must be acquitted.[179] Case law in Mississippi may be divided between those decisions holding absolutely that voluntary intoxication is no defense to a criminal charge[180] and those decisions

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in Mississippi the offense of murder requires the "deliberate design to effect the death of the person killed." *See* MISS. CODE ANN. § 97-3-19(1)(a) (Supp. 1978).

At common law and by statute burglary requires a specific intent. Under the offense of burglary, when a person breaks and enters it is the intent to commit a felony that is the essence of the crime. If one accused of burglary is intoxicated to the extent that he is incapable of forming the intent to commit a felony, he should be acquitted. *See* McFarland v. State, 212 Miss. 802, 807, 55 So. 2d 457, 459 (1951) (if jury believed that defendant was too drunk to entertain the specific intent to steal at the time he broke and entered the house, jury should find the defendant not guilty). Similarly, evidence of intoxication could be used to negate the specific intent required for larceny, robbery, forgery and perjury. *See, e.g.*, Best v. State, 235 Miss. 318, 108 So. 2d 840 (1959). In *Best* the appellant testified that at the time the two cows in question were taken, he had been on a drunken spree for two weeks. *Id.* at 320, 108 So. 2d at 840. The trial court instructed the jury that voluntary intoxication was no defense. *Id.* at 322, 108 So. 2d at 841. On appeal, this instruction was held to be reversible error because the appellant might have been too drunk to form the intent to steal. *Id.* at 322-23, 108 So. 2d at 841-42.

Offenses such as rape, assault and battery and kidnapping, however, fall into the general intent category, and the defense of voluntary intoxication is of no avail. *See generally* Comment, *Intoxication As a Defense to Criminal Actions in Arkansas*, 11 ARK. L. REV. 160 (1957).

[177] *See* Berry v. State, 288 So. 2d 457, 459 (Miss. 1974) (mere voluntary intoxication is a defense only when "such intoxication exists to a degree . . . which renders an accused incapable of forming the necessary intent to commit the crime charged and incapable of knowing right from wrong."); Edwards v. State, 178 Miss. 696, 174 So. 57 (1937). In *Edwards*, the court stated:

> Larceny is analogous to murder in the first degree. A mere intentional trespass to another's goods does not constitute it, but the specific intent to steal must be added. So that if one without the intent to steal becomes too drunk to entertain it, and in this condition takes another's goods, and relinquishes them before the intent could arise, or returns them the instant his restored mind has cognizance of the possession of them, there is no larceny.

Id. at 699, 174 So. at 58 (quoting 1 J. BISHOP, CRIMINAL LAW §411 (9th ed. 1923)).

[178] Hall, *supra* note 175, at 1062.

[179] *Id.*

[180] *See* Stokes v. State, 240 Miss. 453, 472, 128 So. 2d 341, 348 (1961) (voluntary intoxication is no defense in a murder case); Wixon v. State, 229 Miss. 430, 434-35, 90 So. 2d 859, 861 (1956) (voluntary intoxication held no excuse for commission of assault and battery with intent to murder); Gaddis v. State, 207 Miss. 508, 515, 42 So. 2d 724, 726 (1949) (fact that defendant was intoxicated did not reduce his crime from murder to manslaughter); Melton v. State, 155 Miss. 659, 661, 124 So. 802, 802-03 (1929) (neither

applying the exculpatory doctrine to crimes requiring specific intent.[181] The court's recent decision in *McDaniel v. State*,[182] however, clearly precludes future application of the exclupatory doctrine.

The court held in *McDaniel*, through a specially concurring opinion by Justice Sugg,[183] that a person in a state of voluntary intoxication must be held accountable for injuries inflicted upon others while in that state.[184]

The court thus placed Mississippi in a minority position with at least five other states that absolutely refuse to recognize voluntary intoxication as a defense to criminal conduct.[185]

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partial nor complete intoxication is a defense to murder).

[181] *See* Ryals v. State, 305 So. 2d 354, 356 (Miss. 1974) (within the province of the jury to decide whether the appellant, who had been convicted of assault and battery with intent to kill for shooting his unarmed son with a twelve gauge shotgun, was at the time of the shooting intoxicated to a degree that rendered him incapable of forming the necessary intent to murder); Bieller v. State, 275 So. 2d 97, 99 (Miss. 1973) (it was for the jury to decide whether defendant, who had killed a woman with whom he had been living by shooting her once in the head at close range with a shotgun, was intoxicated to such an extent that he was incapable of forming the malicious intent or "malice aforethought" necessary for the crime of murder); McPherson v. State, 208 Miss. 784, 786, 45 So. 2d 589, 590 (1950) (court examined the evidence to determine whether defendant, who had been convicted of robbery, had been too drunk to form the intent to commit larceny); Edwards v. State, 178 Miss. 696, 698, 174 So. 57, 58 (1937) (if sixteen-year-old youth who had stolen an automobile had been so intoxicated that he was unable to form the intent to steal, he could not be convicted of larceny).

[182] 356 So. 2d 1151 (Miss. 1978).

[183] *Id.* at 1156 (Sugg, J., specially concurring). "[V]oluntary intoxication by a defendant should not be permitted as a defense if a defendant, when sober, is capable of distinguishing between right and wrong, and the defendant voluntarily deprives himself of reason by intoxication, and commits an offense while in that condition." *Id.* Three other justices joined Justice Sugg in his specially concurring opinion and thereby comprised a majority of the seven justices who heard the case.

[184] *Id.* at 1159.

[185] *Id.* n.1. The other states include Georgia, Missouri, Texas, Vermont and Virginia. *See* Mullins v. State, 213 Ga. 331, 99 S.E.2d 117, 118 (1957) (affirming a conviction of murder despite evidence that defendant was voluntarily drunk when he killed his wife); State v. Street, 498 S.W.2d 523, 524 (Mo. 1973) (in prosecution for obtaining money by fraudulent trick, instructions that voluntary intoxication was not a defense held proper); Dubois v. State, 164 Tex. Crim. 557, 301 S.W.2d 97, 101 (1957) (affirming a conviction for indecent exposure the court held that defendant's contention that intoxication would prevent the forming of the specific intent required by statute was in direct conflict with another statutory provision providing that intoxication was no defense to crime), *cert. denied*, 356 U.S. 921 (1958); State v. Frotten, 114 Vt. 410, 46 A.2d 921, 927 (1946) (voluntary intoxication does not excuse crime or reduce the degree of a homicide where the perpetrator was previously in the requisite condition of mental responsibility); Chittum v. Commonwealth, 174 S.E.2d 779, 782 (Va. 1970) (in prosecution for attempted rape trial

Early common law made little or no concession for drunkenness.[186] The earliest English[187] case on this issue was *Reniger v. Fogossa,*[188] in which the death sentence was imposed for a homicide committed by a person in a condition of extreme intoxication.[189] That voluntary drunkenness is no excuse for crime eventually became the fixed rule.[190]

The first Mississippi case dealing with the defense of voluntary intoxication was *Kelly & Little v. State,*[191] in which the defendant had been convicted of manslaughter. Reversing the judgment without disturbing the verdict, the court averred that the law discriminates between the delusion initially induced by intoxication and the insanity that intoxication may ultimately produce.[192] *Kelly & Little* thus permits insanity as a defense even if the insanity is the consequence of prolonged use of intoxicants, but precludes invocation of voluntary drunkenness as a defense.[193] The test formulated by *Kelly & Little* is whether the defendant was capable of distinguishing between right and wrong when sober.[194]

In *Melton v. State,*[195] decided eighty-five years after *Kelly & Little,* the court held firm to the established rule that voluntary

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court properly refused to instruct jury that voluntary drunkenness may be a defense where the crime charged requires specific intent.

[186] Hall, *supra* note 175, at 1046.

[187] For a thorough discussion of the development of the law respecting the defense of voluntary intoxication in the criminal law of Canada and England, see Gold, *An Untrimmed "Beard": The Law of Intoxication as a Defense to a Criminal Charge,* 19 CRIM. L.Q. 34 (1976).

[188] 1 Plowden 1, 75 Eng. Rep. 1 (K.B. 1551).

[189] Hall, *supra* note 175, at 1046.

[190] The rule was formulated in Pearson's Case, 2 Lew. C.C. 144, 168 Eng. Rep. 1108 (N.P. 1835); *see* Hall, *supra* note 175, at 1054 n.45.

[191] 11 Miss. (3 S & M) 518 (1844).

[192] *Id.* at 528.

[193] *See* 356 So. 2d at 1157.

[194] *See id.* This test was derived from the consideration that "the design to commit a crime may have previously existed or been contemplated, and the intoxication have been employed 'to screw the courage to the sticking place.' " 11 Miss. (3 S & M) at 527. *See generally* Note, *Criminal Law—Intoxication and Specific Intent in Homicide Prosecution,* 19 LA. L. REV. 524, 525 (1959) ("If the defendant drinks for the purpose of securing the courage necessary for the perpetration of the crime, or, if having the courage and the specific intent, he accidentally becomes intoxicated, this intoxication will not constitute a defense.").

[195] 155 Miss. 659, 124 So. 802 (1929).

intoxication is no defense,[196] and refused to distinguish partial intoxication from complete intoxication.[197] In 1932, the Mississippi Supreme Court unveiled the exculpatory doctrine[198] in *Long v. State,*[199] and for the first time held that voluntary intoxication may negate specific intent.[200]

Subsequent cases, however, reveal a pattern of vacillation in the court's willingness to apply the doctrine. In *Edwards v. State,*[201] the court held that an accused should be allowed to show in defense that he was too drunk to possess the specific intent to steal when he committed acts that would otherwise constitute larceny.[202] This rationale was also followed in cases involving burglary.[203] In *Wixon v. State,*[204] however, the court approved a jury instruction stipulating that voluntary intoxication does not excuse or justify the commission of a crime because one cannot take advantage of a situation in which he has voluntarily placed himself.[205] In 1961, the court reaffirmed *Kelly & Little* in *Stokes v.*

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[196] *Id.* at 661, 124 So. at 802-03.

[197] *Id.; see* Butler v. State, 39 So. 1005, 1005 (Miss. 1906) (partial intoxication is not a mitigating factor); Gordon v. State, 29 So. 529, 529 (Miss. 1901) (same).

[198] See notes 175 through 178 and accompanying text *supra.*

[199] 163 Miss. 535, 141 So. 591 (1932). One interesting feature of *Long* was the court's statement that it had "frequently decided that voluntary intoxication is no defense to a crime, *unless a specific intent is necessary to contitute crime." Id.* at 547, 141 So. at 593 (emphasis added). As noted in *McDaniel,* the cases cited in *Long* simply do not support that part of the statement concerning specific intent. 356 So. 2d at 1158.

[200] 163 Miss. at 547, 141 So. at 593.

[201] 178 Miss. 696, 174 So. 57 (1937).

[202] *Id.* at 699-700, 174 So. at 58. *Edwards* involved the larceny of an automobile by a sixteen-year-old youth. The court held that if the jury found the youth had been too intoxicated to form the specific intent to steal the car, he should be found not guilty of larceny. *Id.* Twelve years later the same defendant appealed his conviction of grand larceny of a taxi cab. The second time around he was not quite so fortunate. The court found that he had not been so intoxicated as to be incapable of forming the required intent. Edwards v. State, 207 Miss. 328, 332, 42 So. 2d 230, 232 (1949); *accord,* Best v. State, 235 Miss. 318, 322-23, 108 So. 2d 840, 840-41 (1950); McPherson v. State, 208 Miss. 784, 45 So. 2d 589 (1950).

[203] *See* Ladner v. State, 231 Miss. 445, 451, 95 So. 2d 468, 471 (1957) (in prosecution for burglary, question whether defendant was too drunk to entertain the necessary specific intent was for the jury); McFarland v. State, 212 Miss. 802, 55 So. 2d 457 (1951) (defendant should be acquitted of burglary charge if found by the jury to have been too drunk to possess the specific intent to take, steal and carry away goods and chattels then in the victim's house).

[204] 229 Miss. 430, 90 So. 2d 859 (1956).

[205] *Id.* at 434-35, 90 So. 2d at 861. The appellant in *Wixon* had been convicted of assault and battery with intent to murder—obviously a crime with a required specific intent, which makes the court's ruling ever more curious in light of its holding in *Edwards.*

State,[206] holding that voluntary intoxication was no defense to murder.[207] Nevertheless, the trend of decisions after *Stokes* clearly indicates an adoption by the court of the two principles that intoxication is a defense to the extent that it renders the defendant incapable of forming the specific intent required in certain crimes, and that the extent of intoxication is a question for the jury.[208]

The *McDaniel* court expressly overruled those cases "authorizing submission to a jury the question of voluntary intoxication as a defense in specific intent offenses."[209] Implicit in the decision is a keen recognition of the speciousness of the dichotomy between general and specific intent in the context of criminal acts committed by voluntarily intoxicated persons,[210] and of the practical difficulties that attend application of the dual standard.[211] *McDaniel* thus heralds a return to the wise rule of *Kelly & Little*—that one cannot be exculpated from criminal charges on the basis of voluntary intoxication.

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See also Gaddis v. State, 207 Miss. 508, 515, 42 So. 2d 724, 725-26 (1949) (fact that appellant had been intoxicated when crime was committed did not operate to reduce the charge from murder to manslaughter).

[206] 240 Miss. 453, 128 So. 2d 341 (1961).

[207] *Id.* at 472, 128 So. 2d at 348.

[208] *See* Ryals v. State, 305 So. 2d 354, 356 (Miss. 1974) (assault and battery with intent to kill); Berry v. State, 288 So. 2d 457, 459 (Miss. 1974) (attempted armed robbery); Bieller v. State, 275 So. 2d 97, 99 (Miss. 1973) (manslaughter); King v. State, 210 So. 2d 887, 891 (Miss. 1968) (grand larceny); Kendall v. State, 244 Miss. 618, 623, 145 So. 2d 924, 925 (1962) (indecent assault upon female child).

[209] 356 So. 2d at 1162 (Sugg, J., specially concurring).

[210] Justice Sugg, writing for the majority, stated: "There is no valid reason to supply general criminal intent in offenses committed by a person who is voluntarily intoxicated and refusing to supply specific intent in offenses committed by a defendant who is voluntarily intoxicated where specific intent is an element of the offense." *Id.* at 1159.

[211] The *McDaniel* decision will undoubtedly reduce jury confusion in voluntary intoxication cases. *See generally* Comment, *Instructing the Jury on the Defense of Voluntary Intoxication in Tennessee*, 39 TENN. L. REV. 479 (1972).

INSURANCE

I. AGENCY

In two cases this term the Mississippi Supreme Court considered the issue of the ability of a general agent to bind his principal. In *Gulf Guaranty Life Insurance Co. v. Middleton*[1] the court considered whether a bank officer acting as an agent for Gulf Guaranty in providing credit insurance to the bank's creditors bound Gulf on an insurance policy with Middleton above a set maximum liability according to a certain liability schedule.[2] Gulf argued that it had not waived its policy limits and was therefore not liable for any amount above the set maximum liability agreed to with the bank. On appeal, the court affirmed liability for Gulf and held that where an agent has acted with a semblance of authority and has induced a third-party to rely detrimentally on the agent's authority, the principal is estopped to deny that the agent possessed such authority.[3]

In a second case, *Seymore v. Greater Mississippi Life Insurance Co.*,[4] the Mississippi Supreme Court considered the effect of a secret limitation agreement between the insurance company and its bank agent in a master policy. The agent, First National Bank of Rosedale, had issued policies to the deceased in excess of the limitation set up in the master plan.[5] Greater Mississippi subsequently refused to pay any amount in excess of the master policy limitation and the estate of the deceased sued for the full amount of the coverage issued by the bank agent.[6] The trial court limited recovery to the amount of the insured's indebtedness to

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[1] 361 So. 2d 1377 (Miss. 1978).

[2] *Id.* at 1381. Citizen's Bank, acting as agent for Gulf, had given Victor Middleton credit insurance of up to $19,050 at the time of his death. This amount far exceeded the maximum of $10,000 allowed under a master plan agreement between Gulf and the bank. Gulf paid $9,050 to the bank to cover Middleton's debts and the executrix sued for the remaining amount allegedly covered. *Id.*

[3] *Id.* at 1382-83. The court also found the bank and the bank officer to be secondarily liable to Gulf.

[4] 362 So. 2d 611 (Miss. 1978).

[5] *Id.* at 612. Two separate certificates of insurance had been issued to the deceased—one for $2,500 and one for $15,000. *Id.*

[6] *Id.* Greater Mississippi refused to pay any amount in excess of $10,000, leaving the $7,500 excess coverage in dispute. *Id.*

the bank at the time of his death.[7] On appeal, the Mississippi Supreme Court held that the estate of the deceased was entitled to the full policy coverage, noting that neither the insurance company nor the agent had advised the insured of the master policy limitation and, therefore, neither the insured nor his heirs were bound by such a secret limitation.[8]

The doctrine of apparent authority stipulates that as between an agent, his principal, and third parties, the apparent authority of the agent becomes, in the absence of suspicious circumstances, his actual authority.[9] The elements necessary to the establishment of an apparent authority case include acts of the principal, reliance by a third person, and a detrimental change of position by the plaintiff.[10] All elements have been recognized in Mississippi.[11] In consonance with established case law, both Mississippi Supreme Court decisions from this last term concerning agency manifested a conjunction of those elements and provided the court an opportunity to reaffirm its position on a doctrine first recognized in 1910.[12]

The court solidified its position concerning the doctrine of apparent authority in the early case of *Germania Life Insurance Co. v. Bouldin,*[13] by declaring that agents have only such powers as have been conferred *or* as third persons have a right to assume they possess.[14] The doctrine was subsequently applied freely, with the court's disregarding statutory law that would on its face make an agent the general agent of his principal for essentially any action he took, including the modification of a policy,[15] until the

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[7] *Id.* at 613. The trial court noted that among the terms of the policy was a stipulation that the insurance coverage was not to exceed the original principal amount of the borrower's note. At the time of the decedent's death he was indebted to the bank for $10,790. The trial court therefore awarded his estate only $790 in excess of the $10,000 limit. *Id.*

[8] *Id.* at 614.

[9] *E.g.,* Steen v. Andrews, 223 Miss. 694, 697-98, 78 So. 2d 881, 883 (1955).

[10] *Id.* 78 So. 2d at 883.

[11] *Id.* 78 So. 2d at 883 (1955) (also noting that the apparent powers of an agent are, because of operation of the doctrine of estoppel, his real powers).

[12] *See* Sutherland v. Federal Ins. Co., 97 Miss. 345, 352, 52 So. 689, 690 (1910) (revocation of agency unknown to insured—renewal of vacancy permit in fire insurance policy by agent held to bind insurance company).

[13] 100 Miss. 660, 679-80, 56 So. 609, 613-14 (1911) (rider placed by agent on the policy and believed by the insured to be part of the policy held enforceable against insurance company).

[14] *Id.* at 678, 56 So. at 613.

[15] MISS. CODE ANN. § 5196 (1930). *See generally* Comment, *The Agency Problems of*

decision in *Big Creek Drug Corp. v. Stuyvesant Insurance Co.*[16] This case first construed the statute presently codified as section 83-17-1.[17] Under this statute any person who solicits insurance or offers to adjust claims or perform other specified acts is deemed to be the agent of the company for which the act is done despite any contrary stipulations in the contract.[18]

Section 83-17-1 was initially interpreted as binding a principal anytime his agent transacted business with an insured regardless of the agent's actual conferred authority or apparent authority.[19] The most significant flaw in the court's initial interpretation became apparent in *American Bankers' Insurance Co. v. Lee.*[20] In this case a special agent advised an insured that the insured would be covered before actually paying a premium, an assurance contrary to the policy provision.[21] Noting that such an extension of liability would literally bind the company to any representation the agent made, the court declined to use the statute to raise the status of the special agent to that of a general agent.[22]

The court followed the same reasoning in the landmark decision in *Saucier v. Life & Casualty Insurance Co.*[23] In *Saucier,* a special agent of the principal insurer assured the wife of the insured that she would be covered before the required advance premium payment had been made on the policy despite a contrary policy provision.[24] The court held that applying section 83-17-1 to elevate the special agent to the level of a general agent was a denial of due process to the insurer.[25] It further echoed the widely accepted principle that waiver and estoppel should not be invoked to extend the coverage of an insurance contract.[26]

Insurance Liability in Mississippi—The Effect of Section 5196, Mississippi Code of 1930, Upon Waiver and Estoppel, 14 MISS. L.J. 220, 227 (1942).

[16] 115 Miss. 561, 76 So. 548 (1917).

[17] MISS. CODE ANN. § 83-17-1 (1972).

[18] *Id.*

[19] *See, e.g.,* Home Ins. Co. v. Thornhill, 165 Miss. 787, 791-92, 144 So. 861, 862 (1932) (solicitous agent gave falsified application binding company despite contrary policy provision).

[20] 161 Miss. 85, 134 So. 836 (1931).

[21] *Id.* at 99-101, 134 So. at 837-38.

[22] *Id.* at 105, 134 So. at 839.

[23] 189 Miss. 693, 198 So. 625 (1940).

[24] *Id.* at 699, 198 So. at 626.

[25] *Id.* at 705, 198 So. at 629.

[26] *Id. See also* 17 J. APPLETON, INSURANCE LAW AND PRACTICE § 9404 (1945).

But the clear mandate of *Saucier* did not impinge on the court's decision in *Liverpool & London & Globe Insurance Co. v. Delaney.*[27] In this case, relying on section 5196,[28] the predecessor of section 83-17-1, the court held an insurer bound on the waiver of express policy provisions.[29] Arguably the agency of the representative here was found to be binding because he was originally a general agent, although the opinion did not explicitly articulate this rationale. Similarly, in *Hewett-Williams & Williams Construction Co. v. Capital Fire Insurance Co.,*[30] the same statutory provision[31] was cited to support the imposition of liability upon the insurer because of the representations of its employee, who presumably had functioned as a general agent.[32]

Through *Saucier,* the court limited the operation of the statute to acts of the agent that fall within the general scope of the authority conferred upon him. While maintaining a distinction between general and special agents,[33] it provided a viable and litigable connection between the agent and his principal for a given act.[34] After *Saucier,* however, references to the statute in decisions involving similar facts have been sparse. Cases have referred only to the principles of waiver and estoppel and have ignored the rich history of case law interpreting the Mississippi statute.[35] Beginning with *Hartford Accident & Indemnity Co. v. Lockard,*[36] the court has concerned itself only with waiver and estoppel and has applied the doctrines in a manner similar to the treatment given section 83-17-1 in *Saucier.*[37] In *Hartford* the court held that an agent could not waive express provisions contained in an insurance policy.[38] This rule has been reaffirmed in later

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[27] 190 Miss. 404, 200 So. 440 (1941).

[28] MISS. CODE ANN. § 5196 (1930).

[29] 190 Miss. at 411-412, 200 So. at 441.

[30] 188 F.2d 241 (5th Cir. 1951).

[31] MISS. CODE ANN. § 5706 (1942).

[32] 188 F.2d at 243.

[33] 189 Miss. at 705, 198 So. at 629; *see* American Nat'l Ins. Co. v. Walters, 230 Miss. 616, 633-34, 93 So. 2d 616, 623 (1957) (general agent may waive a ground for forfeiture but a special agent may not).

[34] 198 So. at 629; *see* Comment, *supra* note 15, at 233. *See generally* Stovall, *Authority of Insurance Agents to Bind the Company,* 14 BAYLOR L. REV. 413 (1962).

[35] *Compare* 361 So. 2d at 1382 *with* notes 29, 32 & 34 and accompanying text *supra.*

[36] 239 Miss. 644, 124 So. 2d 849 (1960).

[37] See note 25 and accompanying text *supra.*

[38] 239 Miss. at 658, 124 So. 2d at 855.

cases.[39]

The general exception to the rules established by case law construing insurance agency statutes and the theories of waiver and estoppel occurs when an agent has an agreement with his principal that is in derogation of the agent's apparent powers. In such a situation, the Mississippi Supreme Court has followed the general rule concerning secret agreements[40] by holding that they will not be enforced to the detriment of innocent third parties. This rule has been applied in the case of an agent's countersigning a certificate, effectively extending the duration of risk coverage contrary to provisions in a master policy.[41] It has also been followed where an agent has been authorized to extend certain coverages but has done so improperly.[42]

Thus, while Mississippi has statutory authority insuring that certain acts by an agent will have the support of actual authority of his principal,[43] the court has chosen to base its decisions upon general principles of waiver and estoppel and to employ reasoning that has restricted the effect of the statute. Estoppel is restricted to those matters covered in the contract that do not contradict express policy provisions where the policy is shown to the insured.[44] Secret agreements are therefore of no effect regarding third parties. The court also appears to ignore deliberately the statute for waiver, a more established approach allowing for a greater flexibility of treatment. While the acts of an agent are strictly scrutinized to determine whether they fall within the ambit of the statute,[45] this stricture does not inhibit the waiver analysis. Regardless of the conceptual cornerstone relied upon, however, the court has clearly reaffirmed that it will impose lia-

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[39] *See* Frank Gardner Hardware & Supply Co. v. St. Paul Fire & Marine Ins. Co., 245 Miss. 320, 325, 148 So. 2d 190, 193 (1963) (doctrines of waiver and estoppel may not be used to extend insurance policy coverage or to create liability, but may only affect rights reserved in the policy); Employers Fire Ins. Co. v. Speed, 242 Miss. 341, 346, 133 So. 2d 627, 629 (1961) (same).

[40] *See* Comment, *Insurance Companies' Liability for the Acts of Agents,* 14 CLEV. MAR. L. REV. 580, 583 (1965).

[41] *See* Bankers Serv. Life Ins. Co. v. Self, 237 Miss. 599, 602, 115 So. 2d 692, 694 (1959) (master policy not shown to insured).

[42] *See* Southern Ins. Co. v. Ryder Truck Rental, Inc., 240 So. 2d 283, 289 (Miss. 1970) (agent allowed a substitution that was not explicitly prohibited).

[43] See notes 17 & 18 and accompanying text *supra.*

[44] See notes 18, 26 & 39 and accompanying text *supra.*

[45] *See* Comment, *supra* note 15, at 228.

bility on a principal who has delegated to its agent either explicitly or apparently the authority to perform some act that has injured another party.

II. Omnibus Clause

In *Vaughn v. State Farm Mutual Automobile Insurance Co.*,[46] the Mississippi Supreme Court was faced with construing a statute that brings within the coverage of a comprehensive auto insurance policy any person other than the owner who suffers injury while using the vehicle with the express or implied permission of the named insured.[47] In *Vaughn,* the owner of the car had allowed his ex-wife to retain and use the car. The ex-wife in turn customarily allowed her daughter to use the car. The daughter had permitted a friend, Creely, to use the vehicle on an occasion when an accident occurred and injured the plaintiff, a passenger in the car. Having previously obtained a judgment against Creely, plaintiff Vaughn sued the insurance company on a writ of garnishment based on the omnibus clause of the insurance policy.[48] The court held that the omnibus clause, even as extended by the language of section 63-15-43, did not cover the driver since there was no evidence that he had the permission of the owner to use the car.[49]

Omnibus clause litigation is a relatively recent development in Mississippi.[50] The first case that squarely addressed the issue was *Employers Mutual Casualty Co. v. Poe.*[51] In *Poe* an intoxicated employee who had permission to use an employer-owned vehicle for a restricted purpose had an accident some twenty miles from his destination.[52] The court surveyed the treatment these clauses had been given in other jurisdictions and noted three available approaches to resolve the issue. The strict, or conversion, rule requires that for the use of the vehicle to be within the omnibus clause, permission must have been given to

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[46] 359 So. 2d 339 (Miss. 1978).

[47] Miss. Code Ann. § 63-15-43 (1972).

[48] 359 So. 2d at 340-41.

[49] *Id.* at 343.

[50] As late as 1956, case law was nonexistent. Faude, *Automobile Liability Coverage Under the National Standard Automobile Policy,* 27 Miss. L.J. 120, 128 (1956).

[51] 191 So. 2d 541 (Miss. 1966).

[52] *Id.* at 546.

the permittee for the particular use being made of the vehicle at the time of the accident.[53] An option adopted by some jurisdictions, the liberal rule, proposes that the employee need only have received permission to use the vehicle and any use he makes of it thereafter is with permission of his employer.[54] The moderate, or minor deviation, rule holds that a substantial deviation from the permissive use will exclude from permission the use leading to the accident.[55]

While not unequivocally adopting any of the three rules, the Mississippi Supreme Court selected the minor deviation rule as a wise middle ground backed and used by a majority of courts.[56] Ruling that the term "actual use" used in the omnibus clause of the insurance contract was the same as permissive use, the court further concluded that the actual use made by the employee was so aberrant that it must be excluded from the penumbra of permission.[57]

Two years later the court reviewed another deviation by an employee making permissive use of his employer's vehicle in *Travelers Indemnity Co. v. Watkins.*[58] In this case an employee was allowed to take a truck home on Saturday but was impliedly forbidden to use it on Sunday. The employee did use the truck on Sunday and had an accident.[59] Recognizing the slightly ambiguous tenor of its *Poe* holding, the court opted for a position between the minor deviation and liberal rules.[60] Upholding omnibus clause coverage in favor of the employee, the court observed that the legislature's intent in passing section 63-15-43 was to protect the public and provide coverage when persons are injured on state highways.[61] Such a legislative intent should have authorized the court to construe the broadening effect of section 63-15-43 even more liberally. Its inherently conservative posture, however, ap-

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[53] *E.g.*, Johnson v. American Auto. Ins. Co., 131 Me. 288, 161 A. 496, 497-98 (1932).

[54] *E.g.*, Jefson v. London Guarantee & Accident Co., 293 Ill. App. 97, 11 N.E.2d 993, 994-95 (1937); *see* 191 So. 2d at 545-46.

[55] *E.g.*, 191 So. 2d at 545-46; Denny v. Royal Indemnity Co., 26 Ohio App. 566, 159 N.E. 107, 109-10 (1927).

[56] 191 So. 2d at 546.

[57] *Id.*

[58] 209 So. 2d 630 (Miss. 1968).

[59] *Id.* at 631.

[60] *Id.* at 634.

[61] *Id.*

parently prevented the adoption of the liberal rule.

In the same year the court considered how far permission extends to relatives of one using a vehicle with permission. In *International Service Insurance Co. v. Ballard,*[62] the court followed jurisdictions holding that the permission of a car dealer's sales manager to a customer included permission for the customer's daughter, who did not have a driver's license, to use the vehicle.[63] While eschewing the liberal rule,[64] the court nevertheless construed permission so broadly that it de facto effectuated such a rule.

In 1971 the same court narrowed its position. In *United States Fidelity & Guaranty Co. v. Stafford*[65] the son of the insured was a passenger in his own car while the car was being driven by his friend. His father's consent was held to have been implied because of a lack of past objections.[66] Adopting the general rule,[67] the court decreed that when an original permittee is riding with a second permittee or when the second permittee is using the vehicle to serve some purpose of the first permittee, coverage is mandated.[68] This same policy was reiterated in the most recent case prior to the instant case, *State Farm Mutual Automobile Insurance Co. v. Moore.*[69] In *Moore* coverage was allowed under the "serving a purpose for the first permittee" doctrine where the insured's son allowed a friend to drive his car.[70]

Mississippi, therefore, has faced three principal issues concerning the construction of the omnibus clause: (1) the interpretation of "actual use,"[71] (2) the extent to which implied permittees may be insured,[72] and (3) the types of deviations from the

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[62] 216 So. 2d 535 (Miss. 1968).

[63] *Id.* at 541; *see* Card v. Commercial Cas. Ins. Co., 20 Tenn. App. 132, 95 S.W.2d 1281, 1285 (1936) (implied permission from insured brings driver within the policy). *See also* Georgia Cas. Co. v. Waldman, 53 F.2d 24, 25 (5th Cir. 1931) (express permission for use of car given by insured's agent).

[64] 216 So. 2d at 541.

[65] 253 So. 2d 388 (Miss. 1971).

[66] *Id.* at 392.

[67] *E.g.,* Standard Accident Ins. Co. v. New Amsterdam Cas. Co., 249 F.2d 847, 853 (7th Cir. 1957).

[68] 253 So. 2d at 392.

[69] 289 So. 2d 909 (Miss. 1974).

[70] *Id.* at 912.

[71] See note 57 and accompanying text *supra.*

[72] See notes 62 through 70 and accompanying text *supra.*

permitted use that are sufficient to avoid coverage.[73]

The first and last issues were not confronted in *Vaughn.* At issue was the topic of permission and delegation of permission[74] rather than the application of the minor deviation rule. Generally, an employee who is given permission to use a vehicle does not have the authority to delegate and thereby make another an additional insured.[75] The same rule prevails outside the agency context as well.[76] In *Vaughn,* while the daughter had the implied permission of the owner, she was not empowered to grant permission to a third permittee.[77] This holding supports the majority rule regarding delegation and rejects a sweeping inclusion of any use under all circumstances within the ambit of the omnibus clause. Such a holding reiterates the court's reluctance to expose insurance companies to unlimited liability without regard to the variety of uses to which the covered vehicle might be put.

III. Punitive Damages

Three cases that were before the Mississippi Supreme Court last term in the field of insurance gave the court a chance to examine the role of punitive damages claims in insurance law. One of these cases, however, denied punitive damages without reaching damages as an issue in the case.[78]

In *New Hampshire Insurance Co. v. Smith*[79] a punitive damages claim was the sole issue before the court. Middleton, plain-

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[73] See notes 57 through 60 and accompanying text *supra.*

[74] *See* 359 So. 2d at 343.

[75] *See, e.g.,* Trotter v. Union Indem. Co., 33 F.2d 363, 363-64 (N.D. Wash. 1929) (where employee of insured loans automobile to third party, damages are not recoverable under liability policy); Monroe v. Heard, 168 So. 519, 521 (La. Ct. App. 1936) (insured's liability policy does not extend to second permittee without consent). *But cf.* Traveler's Indem. Co. v. Watkins, 209 So. 2d 630, 635 (Miss. 1968) (employee covered under insured's liability policy where only minor deviation from permitted use occurred); Fleming v. Traveler's Ins. Co., 206 Miss. 284, 296, 39 So. 2d 885, 888 (1949) (wife separated from husband covered by husband's policy).

[76] *E.g.,* Aetna Cas. & Sur. Co. v. DeMaison, 213 F.2d 826, 834 (3rd Cir. 1954) (permission to use car does not bring second permittee within coverage of insured's liability policy).

[77] 359 So. 2d at 343.

[78] Mutual Life Ins. Co. v. Douglas, 356 So. 2d 1145, 1150-51 (Miss. 1978) (verdict of $50,000 based on insurance policy and $250,000 punitive damages reversed because evidence was clear and convincing that exact terms and provisions of insurance contract were complied with).

[79] 357 So. 2d 119 (Miss. 1978).

tiff's neighbor, had a New Hampshire policy providing for $500 in medical payments for injuries sustained on her premises, and for $25,000 liability coverage. Smith was injured and, when New Hampshire refused to pay more than the $500 amount covering medical bills, he sued for punitive damages.[80] Holding that Smith was not entitled to a punitive damages award, the court stated that punitive damages were recoverable for breach of contract only when the breach was of such a degree that it constituted an independent tort.[81] The court concluded that Smith's proof fell short of that requirement.

In *Bellefonte Insurance Co. v. Griffin*[82] the court reached a similar result. In this case Griffin sued the insurance company for punitive damages when the insurer refused to pay a repair bill on Griffin's truck, resulting in a foreclosure, sale, and loss of the truck.[83] Refusing to allow a punitive damages award, the court again noted that for such damages to be recoverable some intentional wrong, insult, abuse or gross negligence amounting to an independent tort must be present. The failure of the insurer to investigate fully the depreciated value of the truck in order to assess its coverage liability for repair work was held not to warrant punitive damages.[84]

While the matter of punitive damages in a breach of contract action seems to have received a varied treatment from jurisdiction to jurisdiction, Mississippi has adhered to a well-settled rule that punitive damages are not allowed in a breach of contract action except where the breach is so outrageous that it constitutes a separate tort.[85] This position has placed our state in the majority of jurisdictions concerning the treatment of punitive damages.[86] In this area courts generally have adopted one of three approaches: (1) imposing statutory penalties,[87] (2) disallowing

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[80] *Id.* at 120.

[81] *Id.* at 121.

[82] 358 So. 2d 387 (Miss. 1978).

[83] *Id.* at 389.

[84] *Id.* at 391.

[85] *E.g.*, American Ry. Express Co. v. Bailey, 142 Miss. 622, 631, 107 So. 761, 763 (1926); Bland v. Smith, 197 Tenn. 683, 277 S.W.2d 377, 379 (1955). *Contra*, J. CALAMARI & J. PERILLO, CONTRACTS § 14-3, at 520 (2d ed. 1977).

[86] See notes 82 through 84 and accompanying text *supra*.

[87] *See* Keintz & Mann, *Extra-Contract Damages for Breach of Insurance Contracts: The Statutory Approach*, 1978 INS. L.J. 7, 8.

recovery of punitive damages,[88] or (3) allowing punitive damages only for an independent tort.[89]

The Mississippi view concerning punitive damages was formulated in the earliest cases concerning breach of contract.[90] The rule requiring that an injury result from an intentional wrong or gross negligence amounting to an independent tort was solidified in the early case of *American Railway Express Co. v. Bailey*,[91] in which a foreign cable agent's refusal to convert wired money into American dollar value was held not to amount to an independent tort.[92] Subsequent Mississippi cases followed the same doctrine. One awarded punitive damages in a situation not clearly based on a breach of contract[93] and another denied punitive damages in an action based upon the failure of an insurer to settle a collision claim.[94] In the recent case of *Lincoln National Life Insurance Co. v. Crews*[95] the court went further and examined the effect good faith in an insurer's actions has in the awarding of punitive damages. In *Crews*, the court found that an insurer's rejection of a claim under one of its policies and defense in a subsequent suit predicated upon the rejection was based on a legitimate and good faith position not rising to an independent tort.[96]

Soon after the *Crews* decision the Mississippi Supreme Court in 1977 decided another case that opened up questions concerning the previous conservative approach used by the court in insurance punitive damages situations. In *Standard Life Insurance Co. v. Veal*[97] an insurer capriciously refused to pay a claim that was

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[88] *See* J. CALIMARI & J. PERILLO, *supra* note 85, § 14-3, at 520.

[89] *E.g.*, Bland v. Smith, 197 Tenn. 683, 683, 277 S.W.2d 377, 379 (1955).

[90] *See* Hood v. Moffett, 109 Miss. 757, 764, 69 So. 664, 666 (1915) (physician's breach of contract to attend to a woman during childbirth held not to justify awarding of punitive damages since his omitted act did not amount to a tort).

[91] 142 Miss. 622, 107 So. 761 (1926).

[92] *Id.* at 630-31, 107 So. at 763.

[93] D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 221, 16 So. 2d 770, 773 (1944) (punitive damages awarded where the cutting of timber destroyed a fence since such action was a tort regardless of whether the duty not to destroy the fence arose under contract).

[94] Progressive Cas. Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975) (insurer's failure to settle insured's claim under collision coverage clause held not to be an intentional wrong, insult, abuse, or gross negligence constituting an independent tort).

[95] 341 So. 2d 1321 (Miss. 1977).

[96] *Id.* at 1322.

[97] 354 So. 2d 239 (Miss. 1977). For a thorough discussion of this case see Hughes, *Standard Life Insurance Co. v. Veal: A Perspective Look at Punitive Damages in*

clearly within the express policy provision.[98] Recognizing the need to deter insurers from pressuring insureds into possibly inadequate settlements, the court concluded that since the insurer's action rose to an independent tort, an award of punitive damages was justified.[99]

Because of the court's clear conservative history in limiting the recovery of punitive damages, *Veal* may appear to represent a break with precedent. The case should, therefore, be meticulously scrutinized. Dictum by the court extolling the virtues of punitive damages as applied to insurance companies[100] has apparently misled some lawyers, according to one author, into believing that anytime an insurance company loses litigation regarding liability, punitive damages are warranted.[101] A closer scrutiny of *Veal* reveals, however, that the court's wrath was directed not at the insurer's reluctance to settle but at the patently frivolous grounds offered at the trial in support of the insurer's position.[102] The primary concern of the *Veal* court was not the elimination of the insurer's right to litigate and lose, but the prevention of harassment and nuisance litigation.

The decisions handed down this past term have affirmed the traditional and cautious approach the Mississippi Supreme Court has historically taken toward awarding punitive damages in breach of contract situations.[103] They have quieted some of the fears that developed following the *Veal* decision and have reinforced the notion that the independent tort requirement is a better approach for treating punitive damages than statutory penalties or a complete ban on punitive recoveries.[104] While statutory penalties offer certainty, they stifle discretionary flexibility. Although the application of the law to the facts is in no way made

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Mississippi, 1 MS. COL. L. REV. 21 (1978) (discussing the holding and future effect of *Veal* in detail).

[98] 354 So. 2d at 248.

[99] *Id.* Punitive damages of $25,000 were allowed.

[100] *Id.*

[101] Hughes, *supra* note 97, at 29. The author believes that all the attention surrounding *Veal* is a result of attorneys' taking favorable language out of context and using it as a rule of law. A more realistic interpretation of *Veal* is simply to view it as a factually limited case that is not a crisp break from established case law. *Id.*

[102] 354 So. 2d at 248.

[103] *Compare* notes 81 through 84 *with* 91 through 96 and accompanying text *supra.*

[104] See notes 91 & 99 through 102 and accompanying text *supra.*

less cumbersome or more judicially expedient through use of the independent tort requirement, the penalty is fixed. To disallow punitive damages totally in insurance contract cases, however, would place the executioner's ax in the hands of giant insurance conglomerates who could then litigate without fear of loss and could unduly pressure the insured to settle for less than that amount rightfully due.

Along with the independent tort rule, Mississippi has solidified its position that an award of punitive damages is to serve as a deterrent[105] rather than to compensate or re-establish the status quo.[106] While recognizing the court's desire to protect the insurance consumer,[107] one must also concede the ultimate validity of the rule of *Hadley v. Baxendale,*[108] which confines consequential damages to those proximately resulting from the breach and which were contemplated by the parties.[109] Concerning insurance contracts, it is indisputable that the disturbance of emotional well-being is seldom contemplated by the insured at the time of contracting.[110] The *Hadley* rule therefore precludes any recovery of punitive damages for contract actions. There is little reason, however, to refuse to award damages for acts so reprehensible as to constitute a separate actionable offense at the same time that damages are given under the *Hadley* rule. Our court has taken the wisest path under the circumstances in retaining a firm foothold in traditional remedies and in avoiding the rashness present in other jurisdictions.

Wayne C. Gulledge

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[105] *See* Snowden v. Osborne, 269 So. 2d 858, 860 (Miss. 1972) (recognizing the element of reward for bringing a wrongdoer to justice for assault and battery); Hines v. Imperial Naval Stores Co., 101 Miss. 802, 806, 58 So. 650, 651 (1912) (action for wrongfully extracting and boxing resin from trees).

[106] *See* J. CALIMARI & J. PERILLO, *supra* note 85, § 14-4, at 521-22.

[107] *See* 354 So. 2d at 248.

[108] 156 Eng. Rep. 145 (1854).

[109] *Id.* at 151.

[110] Stitler, *Extra-Contractual Damages in Suits on Insurance Policies,* 46 U. CIN. L. REV. 170, 172 (1977).

PROPERTY

During 1978 the Mississippi Supreme Court decided approximately twenty cases dealing with property law, five of which will be discussed textually in this section. These five cases expanded upon and contributed to existing Mississippi case law concerning the areas of cotenancy and waste,[1] adverse possession of mineral rights,[2] wrongful foreclosure,[3] dragnet clauses,[4] and landlord and tenant law.[5]

I. Cotenancy and Waste

In 1978 the Mississippi Supreme Court considered whether a tenant in common may sever timber from common property without the consent of her cotenants. In *Threatt v. Rushing*,[6] Mrs. Threatt, who owned a life estate and an undivided one-fourth interest in certain timberland,[7] cut approximately one-tenth of the timber on the property without the consent of her cotenants.[8] The cotenants, who also held the remainder interest, sued Threatt and her two employees, alleging diminution in the value of their interests.[9]

The law of waste is concerned with the extent to which a holder of a limited interest in land is restricted in the use and

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[1] See notes 7 through 27 and accompanying text *infra*.

[2] See notes 28 through 50 and accompanying text *infra*.

[3] See notes 51 through 71 and accompanying text *infra*.

[4] See notes 72 through 108 and accompanying text *infra*.

[5] See notes 109 through 149 and accompanying text *infra*.

[6] 361 So. 2d 329 (Miss. 1978).

[7] Threatt had previously deeded the land, which she owned in fee, to her children and reserved the life estate. Later, one daughter deeded back a one-fourth interest to her. The appellees, Johnny Roy Rushing, Andrew Ray Rushing, and Mittie Edna Rushing Foster, each owned an undivided one-fourth interest. *Id.* at 330. In Threatt v. Rushing, 355 So. 2d 1096, 1096 (Miss. 1978), pending on appeal when she arranged to have the timber cut, Threatt had unsuccessfully attacked the deed she had given to the children. 361 So. 2d at 330 n.1 (Miss. 1978).

[8] Threatt alleged that since her cutting out the mature trees gave the smaller timber more light and growth space, she was actually improving the timberland. The supreme court held, however, that the cutting was a commercial operation intended to produce profit that resulted in waste of the remainder interest of the three children. 361 So. 2d at 330-31.

[9] The lower court had entered a monetary decree against Threatt and her two employees, Henry and Glen Cornish. *Id.* at 330.

enjoyment of his land by the rights of holders of other interests in that land.[10] As among concurrent owners,[11] two views have developed concerning whether one owner may cut timber without

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[10] *See generally* 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 636 (rev. ed. 1977); 5 AMERICAN LAW OF PROPERTY § 20.1 (1952).

The law of waste began to develop at the beginning of the twelfth century. The earliest important statute on waste was the Statute of Morlbridge. Enacted in 1267, it created a cause of action for waste on behalf of life tenants and tenants for a certain number of years. Proving insufficient, the Statute of Morlbridge was replaced in 1278 by the Statute of Gloucester which provided for penalties and forfeitures for waste. *See* 5 AMERICAN LAW OF REAL PROPERTY, *supra,* at §§ 20.16, .17, 5 R. POWELL, *supra,* at 7; Kimbrough, *Law of Waste in Mississippi Territory and State,* 7 MISS. L.J. 234, 238-39 (1935). For an historical discussion of the Mississippi statutes on waste, see *id.* at 247-51.

In the timber-scarce society of England the cutting of timber was considered waste in almost all circumstances. *See* Gage v. Pigott, 53 Ir. L.T.R. 33 (1918), *noted in* 33 HARV. L. REV. 618 (1920); RESTATEMENT OF PROPERTY § 140, Comment d (1936); 5 AMERICAN LAW OF REAL PROPERTY, *supra,* at § 20.2; 5 R. POWELL, *supra,* at 15. These strict rules were quickly relaxed in the American colonies, where cutting timber was a prerequisite to the successful cultivation of crops, through the use of two defenses. The first argument was that the cutting of timber actually increased the value of an inheritance. *See* Sollee v. Daneri, 49 Cal. App. 2d 324, 121 P.2d 781, 783 (1942) (refusing to find waste where value of property increased); King v. Miller, 99 N.C. 583, 6 S.E. 660, 666 (1888) (no waste where clearing of forest growth and fitting soil for cultivation improved the property); Bond v. Godsey, 99 Va. 564, 39 S.E. 216, 217 (1901) (value of timber on the land should not be deducted in ascertaining the value of a life estate therein where the value of the land would be increased by cutting the timber). The second defense was that the cutting of the timber was simply good husbandry. *See* Rutherford v. Wilson, 95 Ark. 246, 129 S.W. 534, 535 (1910) (whether cutting constituted "good husbandry" was determininative of the issue of waste); Moss Point Lumber Co. v. Board of Supervisors, 89 Miss. 448, 526-27, 42 So. 290, 301 (1906) (tenant for years may clear for cultivation as would a "prudent owner in fee"). For a general background on the changes in the common law view of waste in the pioneer days of this country, see RESTATEMENT OF PROPERTY, *supra,* Comment b; 5 AMERICAN LAW OF REAL PROPERTY, *supra,* at § 20.2; 5 R. POWELL, *supra,* at 15.

[11] Although originally an action for waste could be maintained only between successive owners, the Statute of Westminster II in 1285 extended the right to concurrent owners. St. Westminster II (13 Edw. I, A.D. 1285) c. 22. American statutes have similarly extended the remedy to cotenants. *See* 5 R. POWELL, *supra* note 10, at 37 n.3.

Courts have also generally recognized the propriety of injunctive relief to stop cotenants from committing waste. Bradley v. Reed, 3 F. Cas. 1158, 1159 (C.C.W.D. Pa. 1864) (No. 1, 785). Absent a showing that irreparable damage will result if an injunction is not issued, however, it has traditionally been held that an injunction should not issue for an alleged waste since a cotenant is entitled to the use and possession of his property. See 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 651, at 672 (3d ed. 1939). Nevertheless, many cases have recognized the availability of injunctive relief. *See* Chapman v. Faughnan, 183 Ga. 114, 187 S.E. 634, 635 (1936) (tenant in common may enjoin waste by other tenants); Musch v. Burkhart, 83 Iowa 301, 48 N.W. 1025, 1026 (1891) (tenant in common enjoined from cutting trees on boundary line between parties' adjoining tracts); Cotten v. Christen, 110 La. 444, 34 So. 597, 598 (1903) (nonconsenting cotenant may enjoin another cotenant from cutting timber); Leatherburg v. McInnis, 88 Miss. 160, 164, 37 So. 1018, 1018 (1904) (injunction to stop cotenant from boxing trees held proper).

gaining permission from his co-owners. The first view is that a cotenant in possession need not receive consent before cutting timber, at least to the extent of his interest in the fee.[12] This view evolved in part from the common law recognition that the other co-owners had a partition action available to protect their individual interests.[13] Under this theory, a cotenant's right to cut timber on the undivided common property is subject only to a duty to account to the other cotenants for their interests in the timber.[14] This approach is based upon the theory that each cotenant has the right to benefit from the value of his own interest.[15] To hold otherwise, these courts reason, would give one cotenant the power to prohibit other cotenants from ever realizing the value of their shares of the timber, thereby preventing the beneficial use of timber under common ownership.[16]

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[12] *See* Garibaldi v. Garibaldi, 264 Cal. App. 2d 9, 70 Cal. Rptr. 92, 95 (1968) (each co-owner has the right to cut timber to the extent of his individual share); Buchanan v. Jencks, 38 R.I. 443, 96 A. 307, 309 (1916) (cutting of timber does not give a right of action to cotenants); Gillum v. St. Louis, Ark. & Tex. Ry. Co., 5 Tex. Civ. App. 338, 23 S.W. 717, 718 (1893) (tenant in common has right to sell marketable timber on the land short of waste). *See generally* A. FREEMAN, COTENANCY AND PARTITION §§ 234, 250-51 (2d ed. 1886).

[13] 1 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 104, at 441 (1964).

[14] *See* Buchanan v. Jencks, 38 R.I. 443, 96 A. 307, 309 (1916) (cotenant has a right to the enjoyment of his interest); DeWitz v. Saner-Whiteman Lumber Co., 155 S.W. 980, 981 (Tex. Civ. App. 1913) (cotenant entitled to cut his proportionate share of timber); Hatton v. Bodan Lumber Co., 57 Tex. Civ. App. 478, 123 S.W. 163, 168 (1909) (tenant in common had right to appropriate a portion of the timber for his benefit); Gillum v. St. Louis, Ark. & Tex. Ry. Co., 5 Tex. Civ. App. 338, 23 S.W. 717, 718 (1893) (subject to duty to account for proceeds cotenant has right to sell marketable timber); McDodrill v. Pardee & Curtin Lumber Co., 40 W. Va. 564, 21 S.E. 878, 884 (1895) (cotenant's liability for waste is limited to claiming cotenant's proportional interest).

[15] [W]hen there is common ownership, each of the owners is entitled to realize the value of his own interest, and that in considering such a situation the court is entitled to view all of the continguous lands owned by the persons involved so that if one of them takes no more than his legitimate fractional interest of the total the other owners in common may not complain.

Garibaldi v. Garibaldi, 264 Cal. App. 2d 9, 70 Cal. Rptr. 92, 94 (1968).

[16] Martyn v. Knowllys, 8 T.R. 145, 146, 101 Eng. Rep. 1313, 1314 (K.B. 1799), *quoted in* Buchanan v. Jencks, 38 R.I. 443, 96 A. 307, 309 (1916). A contrary posture would require that a cotenant partition the land before he could utilize his portion of the fee.

Nor was it essential that the cotenant who took the trees should have first acquired the consent of the other cotenants, for to require this would in many instances be practically a denial of any benefit to him from the use of trees, and would require a partition of the estate before he could exercise any individual control over his interest in that regard.

DeWitz v. Saner-Whiteman Lumber Co., 155 S.W. 980, 981 (Tex. Civ. App. 1913).

Other jurisdictions, however, hold that timber cannot be cut on common property without the consent of all the tenants in fee.[17] All the cases adopting this second view place great importance on the value of timber, with most considering it to be part of the land itself.[18] This theory is based on the well-settled proposition that a cotenant's right to cut timber in the legitimate role of using and enjoying his estate does not include activities that amount to a taking of the land.[19] Thus, if the jurisdiction in which the land is located considers timber to be part of the realty,[20] the cutting of timber amounts to a taking of the land, and is outside the realm of a cotenant's rights.[21] Some courts have expanded this theory to include as actionable waste the cutting by a cotenant without consent of a substantial amount of timber from land the value of which lies primarily in the timber.[22]

In the instant case, the Mississippi Supreme Court adopted the second view,[23] although it recognized that prior Mississippi authority appeared to uphold the right of one tenant to sever an amount of timber equal to his fractional interest in the land with-

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[17] Rayonier, Inc. v. Polson, 400 F.2d 909, 920 (9th Cir. 1968); Clark v. Whitefield, 213 Ala. 441, 105 So. 200, 206 (1925); Fitzhugh v. Norwood, 153 Ark. 412, 241 S.W. 8, 9 (1922); Fuller v. Montafi, 55 Cal. App. 314, 203 P. 406, 409 (Dist. Ct. App. 1921); Emmons v. Evans, 178 Ky. 180, 198 S.W. 900, 901 (1917); Cotten v. Christen, 110 La. 444, 34 So. 597, 598 (1903); State *ex rel.* Hoke v. Judge of Fourth Jud. Dist., 52 La. Ann. 103, 26 So. 769, 769 (1899); Daniel v. Tollassee Power Co., 204 N.C. 274, 168 S.E. 217, 218 (1933); Provident Life & Trust Co. v. Wood, 96 W. Va. 516, 123 S.E. 276, 281 (1924).

[18] *E.g.*, Rayonier, Inc. v. Polson, 400 F.2d 909, 919 (9th Cir. 1968) (standing timber has traditionally been regarded as real property in Washington).

[19] *See Id.* at 919 (general rule that one cotenant may use and enjoy property to fullest extent consistent with the ordinary manner of deriving profits from such property).

In using and enjoying the property, a cotenant may cut the timber in an act of good husbandry. *See* McLeod v. Dial, 63 Ark. 10, 375 S.W. 306, 307 (1896) (may cut trees only so far as necessary for proper and reasonable enjoyment of estate in conformity with good husbandry).

[20] The Mississippi Supreme Court has ruled that the term "land" includes timber. Bernard v. Board of Supervisors, 216 Miss. 387, 398, 62 So. 2d 576, 581 (1953). Our surrounding neighbors view timber in a similar manner. *E.g.*, Waldrop v. Langham, 260 Ala. 82, 69 So. 2d 440, 442 (1954); Walters v. Sheffield, 75 Fla. 505, 78 So. 539, 541 (1918); Willett Wood Prod. Co. v. Concordia Land & Timber Co., 169 La. 240, 124 So. 841, 842 (1929), *cert. denied,* 281 U.S. 742 (1929).

[21] *See* Rayonier, Inc. v. Polson, 400 F.2d 909, 919 (9th Cir. 1968) (right of enjoyment extends only to products of proper use and not to a taking of the land itself).

[22] *E.g.*, Nevels v. Kentucky Lumber Co., 108 Ky. 550, 56 S.W. 969, 969 (1900); Provident Life & Trust Co. v. Wood, 96 W. Va. 516, 123 S.W. 276, 281-82 (1924).

[23] Threatt v. Rushing, 361 So. 2d 329, 332 (Miss. 1978).

out obtaining his cotenants' consent.[24] Since Mississippi considers timber to be part of the realty,[25] the court reasoned that the destruction of such property should subject a cotenant to an action for waste.[26] The Mississippi Supreme Court should be applauded for its holding and for the manner in which it handled the conflicting authority on this point of the law.

II. Adverse Possession of Mineral Rights

Last year the Mississippi Supreme Court considered whether an action to cancel a conveyance of a mineral interest as a cloud upon a landowner's title was barred by the ten-year statute of limitations on actions at law and in equity to recover land.[27] In

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[24] The earlier Mississippi authority is Leatherbury v. McInnis, 85 Miss. 160, 37 So. 1018 (1904). In this case, when it appeared that one cotenant was committing unreasonable waste of trees growing on the common timberlands by boxing part of them for turpentine and threatening to box the remaining ones, the trial court enjoined the threatening waste. Since it appeared that the lands were valuable chiefly for their timber and that one part was just as valuable as the other, the supreme court held on appeal that the injunction should be limited to confine the appellants' operations to no more than one-half the value and quantity of the trees. The court claimed that it was only modifying the *Leatherbury* decision since that case was limited to a prohibition on enjoining a cotenant from cutting his fractional share where such cutting threatened the "chief property." 361 So. 2d at 332.

[25] See note 20 *supra.*

[26] 361 So. 2d at 331-32.

[27] The two statutes upon which the suit was based are sections 15-1-7 and 15-1-9 of the Mississippi code, which provide as follows:

> A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same.

Miss. Code Ann. § 15-1-7 (1972).

> A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity. However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

Miss. Code Ann. § 15-1-9 (1972).

Bowen v. Bianchi,[28] Bowen had entered into a land purchase contract with Sims in 1942, wherein the parties agreed that upon the payment of four yearly installments Sims would deliver a warranty deed to Bowen.[29] Immediately after execution of the contract, Bowen assumed possession of and established a residence upon the property.[30] Bowen never recorded the contract, and in 1945, while Bowen was still in full possession of the property, Sims, without Bowen's knowledge, executed a purported one-half mineral interest in the property to Morgan, who later conveyed it to Bianchi.[31] In 1946 the contract terms were completed and Bowen received a warranty deed from Sims.[32] Although Morgan had recorded the conveyance of the mineral interest in 1945, Bowen's possession of the land was never disturbed.[33] Bowen instigated this action to remove Bianchi's cloud upon his property in 1975, when he gained actual knowledge of the recorded instrument.[34]

In adverse possession cases involving severable mineral rights,[35] possession of the surface is not possession of the minerals in the absence of active production and appropriation[36] even

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[28] 359 So. 2d 758 (Miss. 1978).

[29] The terms of the contract called for a purchase price of $500. There were to be installments of $100 each with an 8% interest rate attached per annum. The first payment was to be made on the date of execution of the contract, and succeeding payments were due May 15, 1943, 1944, 1945, and 1946. 359 So. 2d at 758.

[30] The Bowens were in uninterrupted possession of the land from the time of the contract until the filing of the suit. They had constructed a number of buildings on the property and were using one as their residence. They had fenced off the land and were using a portion of it for farming. *Id.* at 759.

[31] *Id.* at 758-59.

[32] *Id.*

[33] *Id.* at 759.

[34] Brief for Appellee, Bowen v. Bianchi, 359 So. 2d 758 (Miss. 1978).

[35] For a general discussion on adverse possession of severable mineral rights see R. HEMINGWAY, THE LAW OF OIL AND GAS § 3.5 (1971); 1A W. SUMMERS, THE LAW OF OIL AND GAS § 138 (1954); 1A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 165 (1964); Lee, *Working Part of a Mineral Estate as Adverse Possession of the Whole*, 46 KY. L.J. 67 (1957); Masterson, *Adverse Possession and the Severable Mineral Estate*, 25 TEX. L. REV. 139 (1946); Masterson, *Severance of the Mineral Estate by Grant of Land by the Sovereign and Adverse Possession*, 30 TEX. L. REV. 323 (1952); Masburg, *Statutes of Limitation and Title Examination*, 13 OKLA. L. REV. 125, 154-59 (1960); Stoebuck, *Adverse Possession of Severable Minerals*, 68 W. VA. L. REV. 274 (1966).

[36] Moffett v. International Paper Co., 243 Miss. 562, 566, 139 So. 2d 655, 656 (1962); *see* Anderson v. Boyd, 229 Miss. 596, 608, 91 So. 2d 537, 541 (1956) (adverse possession of the land is not adverse to a severed mineral estate); White v. Merchants and Planters

though there has been a valid severance of the mineral rights. It has also been recognized that "[i]f the claimant's possession commences prior to severance . . . an attempted severance by the owner of the general title does not affect or impair that possession."[37] In such a situation there must be an actual interrruption by, for example, drilling, digging, or the filing of a law suit.[38]

Mississippi considers oil and gas to be part of the realty unless it is brought to the surface and reduced to possession.[39] Therefore, such minerals are generally subject to the same laws as other realty. Following this premise, the court has strong authority to consider a contract for sale in Mississippi coupled with open possession of the land to be a valid conveyance of the surface and mineral rights similar to a conveyance by deed.[40] It is equally well settled in Mississippi that "registration statutes do not affect an owner in possession."[41] The basis for this proposition is that

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Bank, 229 Miss. 35, 48, 90 So. 2d 11, 15 (1956) (possession of surface is not adverse possession of severed mineral rights); Cook v. Farley, 195 Miss. 638, 654-55, 15 So. 2d 352, 357 (1943) (same). *See generally* 1A G. THOMPSON, *supra* note 35 at 74-75 (title to severed mineral rights can be acquired by adverse possession if all requirements of adverse possession are present including working the claim); 1A W. SUMMERS, *supra* note 35, at 307-12 (adverse possession of land is not adverse possession of severed minerals).

[37] Masterson, *Adverse Possession and the Severable Mineral Interest*, *supra* note 35, at 146.

[38] *See* Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 720, 69 Cal. Rptr. 612, 640 (1968) (execution and recording of leases does not in itself constitute notice of an adverse claim; must show visible activities sufficient for notice); Francis v. Francis, 288 Ky. 685, 157 S.W.2d 289, 290 (1941) (must show actual mining operations to give notice of adverse claim to true owner); Masterson, *Adverse Possession and the Severable Mineral Interest*, *supra* note 35, at 146 n.47 (to oust possession of claimant there must be an ouster or interruption by suit).

[39] Merrill Eng'r Co. v. Capital Nat'l Bank, 192 Miss. 378, 393, 5 So. 2d 666, 670 (1942); *see* Whelan v. Johnston, 192 Miss. 673, 685, 6 So. 2d 300, 303 (1942) ("land" embraces both its soil and minerals).

[40] To support this contention the *Bowen* court quoted from an early Mississippi case, Taylor v. Lowenstein, 50 Miss. 278 (1874), which was directly on point. "It has been accepted as the settled law . . . that the occupancy and open possession of land under . . . contract of sale, imports notice to creditors and subsequent purchasers, and gives them the same protection as though these written memorials of title had been recorded." *Id.* at 281; *see* 359 So. 2d at 761 (quoting *Taylor*, 50 Miss. at 281).

[41] Gulf Refining Co. v. Travis, 201 Miss. 336, 365, 29 So. 2d 100, 102 (1947); *see* Federal Sav. & Loan Ins. Corp. v. Urschel, 159 Kan. 674, 157 P.2d 805, 810 (1945) (owner under unrecorded instrument may assert title when in open and notorious possession of realty); B.P. Jones & Co. v. Cash, 190 Ky. 96, 226 S.W. 352, 353 (1920) (possession under an unrecorded agreement is sufficient for inquiry-notice); Smith v. Miller, 289 Pa. 184, 137 A. 254, 256 (1927) (possession of land and ownership of unrecorded deed constitute constructive notice protecting title); Smith v. Robertson, 235 S.W. 847, 848 (Tex. 1921)

actual possession connotes notice to prospective purchasers of the possessor's rights in the property.[42] Under this principle, therefore, Morgan was under a duty to inquire into the facts of the possession as well as any claims the possessor might have to the minerals. Such an inquiry would have revealed the contract and, in turn, Bowen's right to the minerals. As a result of the inquiry —notice stemming from Bowen's possession, Morgan was not a bona fide purchaser without notice. Bowen's failure to record his contract coupled with Morgan's recorded mineral interest therefore made no difference in the final analysis.

In the instant case, Bianchi's defense was predicated upon a line of Mississippi cases holding that a recorded severed mineral interest can begin the running of the statute of limitations against an owner in possession.[43] A close analysis of these cases reveals, however, that each was brought on the ground of fraud, that the owner of the property in each case had actual knowledge of the execution of the instrument sought to be set aside prior to or at the time of its recordation, and that the instrument sought to be set aside in each case was only voidable since it was obtained from a grantor with both legal and equitable title. Because of these differences, the court held this line of cases inapplicable to

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(possession under an executory contract held by vendee may ripen into title). *Contra*, Harris v. Buchignani, 199 Tenn. 105, 285 S.W.2d 108, 111 (1955) (possession under unrecorded contract of sale ignored as notice to bona fide purchaser).

[42] The prevailing rule in most jurisdictions is that possession constitutes notice and thereby puts a purchaser on inquiry concerning the possessor's rights. *See* Whitehead v. Foxfill, 105 F. Supp. 966, 968 (D. Alaska 1952) (plaintiff not a bona fide purchaser because of his failure to inquire into possessor's rights); Holgerson v. Gord, 257 Ala. 579, 60 So. 2d 427, 430 (1952) (purchaser required to make inquiry concerning right of possession); Ellis v. Nickle, 193 Ark. 657, 101 S.W.2d 958, 960 (1937) (possession is notice to the world and subsequent purchaser must make diligent inquiry into nature of the interest); Blun v. Voss, 139 Neb. 233, 297 N.W. 84, 86 (1941) (possession is notice to the world of possessory interest and demands inquiry); Waltrip v. Cathcart, 207 Okla. 404, 250 P.2d 43, 45 (1952) (purchaser charged with notice of the rights of the person in possession).

Mississippi has long held firm on this point. *E.g.*, Stevens v. Hill, 236 So. 2d 430, 434 (Miss. 1970); Beauchamp v. McLauchlin, 200 Miss. 83, 93-94, 25 So. 2d 771, 775 (1946); Kalmin Realty & Ins. Co. v. Hardy, 164 Miss. 313, 317, 145 So. 506, 507 (1933); Russell v. Scarbrough, 155 Miss. 508, 511, 124 So. 648, 649 (1929); Loughridge v. Bowland, 52 Miss. 546, 554-55 (1876).

[43] *See* Cooley v. Cooley, 328 So. 2d 57, 57 (Miss. 1976); Dent v. Calhoun, 326 So. 2d 320, 321 (Miss. 1976); Neal v. Teat, 240 Miss. 35, 38, 126 So. 2d 124, 125 (1961); Gandy v. Burke, 236 Miss. 241, 242-43, 109 So. 2d 926, 926 (1959); Aultman v. Kelly, 236 Miss. 1, 3-4, 109 So. 2d 344, 345-46 (1959); King v. Childress, 232 Miss. 766, 770-71, 100 So. 2d 578, 579-80 (1958).

the instant case.[44] In *Bowen,* the grantor did not have legal and equitable title to pass to the grantee since title had previously been surrendered to Bowen through the land purchase contract.[45] In addition, the landowner in possession did not have any actual knowledge of the mineral interest conveyance until shortly before commencement of the action. The line of opposing cases, containing voidable instruments and actual knowledge of their executions by landowners, therefore represents an exception to the general rule of adverse possession of minerals while the owner is in possession of the surface.[46]

In considering whether Bowen lost any claim to the mineral interest, the Mississippi Supreme Court ruled that the statute of limitations would not run against a person who had good title and actual or constructive possession.[47] The court then reasoned that since the sales contract operated as a conveyance of all surface and mineral rights to Bowen, and since Bowen's open possession of the land imported sufficient constructive notice to Morgan, the statute of limitations never began to run against Bowen's claim.[48]

The most convincing argument favoring the holding in the instant case is based upon public policy. A contrary result would have placed upon a landowner a duty to search systematically the records of land that he had been openly possessing under a legal

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[44] 359 So. 2d at 759-61.

[45] In the distinguishable line of cases the grantor of the mineral interest was the actual owner in possession and was therefore passing at least voidable title to the grantee. In *Bowen,* however, the only thing the grantor had was the legal title. Equitable title was in Bowen and legal title would belong to Bowen as long as he did not default on the contract. Regardless, the grantee was deemed to have knowledge of Bowen's interest, and the deed that passed was therefore void rather than voidable, as was the deed in the cases where the grantor was the owner in possession. *Id.* at 762.

[46] The general rule is that when a mineral deed is conveyed the purchaser has notice of the rights of the owner in possession. Therefore, the purchaser is not a bona fide purchaser for value without notice and would have to possess the minerals adversely by physical act or suit to start the running of the statutes. See notes 35 through 38 and accompanying text *supra.*

The exception occurs when the owner in possession gives up the deed and has actual knowledge of the conveyance, but waits until after the statutory period to remove the cloud on his title.

[47] 359 So. 2d at 760. Neal v. Teat, 240 Miss. 35, 40-41, 126 So. 2d 124, 126 (1961) was cited in support of this proposition. The court had previously distinguished this case, but pointed out that the factors making the case distinguishable were not involved in this facet of *Bowen.*

[48] 359 So. 2d at 761, 762.

contract of purchase.[49] Unlike the contestants in the opposing line of cases mentioned above who had actual knowledge of the severed mineral interest, the landowners in *Bowen* had no way of knowing of such transactions, short of a systematic search of the records. Such a ruling would have left wide open a possibility of fraud by the simple filing of a mineral claim upon the appropriate records in hopes that an unsuspecting legal owner would neglect to check such records and thereby forfeit his valid claim.

III. Wrongful Foreclosure

In *National Mortgage Co. v. Williams,*[50] the Supreme Court of Mississippi held that a second foreclosure based on a delinquent account allegedly caused by a previous foreclosure attempt was a wrongful foreclosure deserving a jury determination upon whether actual or punitive damages were warranted. National Mortgage was assigned a deed of trust that gave a security interest on Williams' property.[51] When a controversy arose over two payments that National claimed had not been made, National refused to accept any future payments until the two past payments were satisfied.[52] Ultimately, National foreclosed and purchased the property. National's subsequent possessory action was dismissed upon discovery that National had been in error regarding the satisfaction of the two payments in controversy.[53] On the same day the possessory action was dismissed, National initiated

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[49] There is authority to support the notions that a vendee in possession should never be required to examine the records for subsequent encumbrances or conveyances of the land by the vendee, and that the record is not notice to the validly possessing vendee. *See* Jaegar v. Hardy, 48 Ohio St. 335, 27 N.E. 863, 864 (1891) (not bound to examine record for subsequent encumbrances).

[50] 357 So. 2d 934 (Miss. 1978).

[51] Margaret Williams executed a note secured by a deed of trust to purchase a home costing $17,300. Her monthly installment payments were $147.40. The Federal Housing Administration guaranteed the loan and was to pay $66.69 of each monthly installment. *Id.* at 935.

[52] Williams had mailed in two payments but they were rejected by National upon the ground that she owed four payments. When Williams offered to produce receipts from National's assignor concerning the validity of the two missing payments, National rejected them claiming that "they meant nothing." Williams later even consented to pay the entire four payments, but National conditioned its acceptance of this offer on Williams' paying, in addition, the attorneys' fees and publication costs of the foreclosure proceedings. *Id.*

[53] National had failed to credit Williams' account for the payments she had made to the original holder of the note. *Id.*

a second foreclosure proceeding based upon Williams' failure to make payments during the previous proceeding.[54] Following the institution of this action, National sent Williams two notices of the foreclosure offering to give any information concerning the account.[55] On appeal from a circuit court holding favorable to Williams the supreme court, in a four-three decision, held that National's action in instigating the second foreclosure proceeding immediately following the previous wrongful action was an unconscionable wrongful foreclosure.[56]

The right to foreclose occurs when there has been a breach of a condition of a valid mortgage or deed of trust the performance of which the mortgage secures.[57] On default of a condition the mortgagor is ordinarily bound by the contract and will not be released from liability under the mortgage.[58] Where there has been a foreclosure without right,[59] however, or unconscionable

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[54] The majority opinion placed emphasis on evidence showing that on the same day the possessory action was dismissed and the second foreclosure proceeding was instituted, National's attorney told Williams that even if she were not in default at the time of the first foreclosure, it would make no difference since she was unquestionably in default at the time of the second foreclosure. *Id.* at 937.

[55] *Id.* at 939 (Smith, J., dissenting).

[56] *Id.*

[57] *See* United States v. Chelsea Towers, Inc., 295 F. Supp. 1242, 1250 (D.N.J. 1967) (only one who has complied with material terms of mortgage contract can avoid its foreclosure); Slaughter v. Qualls, 139 Tex. 340, 162 S.W.2d 671, 675 (1942) (no authority for sale until debtor defaults); United States v. Loosley, 551 P.2d 506, 508 (Utah 1976) (foreclosure is allowed when necesssary to insure payment of debt for which mortgage stands as security); Workman v. Bryce, 50 Wash. 2d 185, 310 P.2d 228, 231 (1957) (foreclosure is proper where there is a past due debt on a valid mortgage).

[58] United States v. Sylacaugce Properties, Inc., 323 F.2d 487, 491 (5th Cir. 1963) (when default is undisputed the court cannot abrogate the right of foreclosure and sale); Northern Properties, Inc. v. Kuf Realty Corp., 30 Misc. 2d 1, 217 N.Y.S.2d 355, 361 (Sup. Ct. 1961) (a mistake, no matter how excusable, does not afford equitable intervention against foreclosure for nonpayment of principal or interest); Clark-Robinson Corp. v. Jet Enterprises, Inc., 159 N.Y.S.2d 214, 216 (Sup. Ct. 1957) (not unconscionable to insist upon enforcement of the terms of the mortgage); Domes Realty Corp. v. 3440 Realty Co., 179 Misc. 778, 40 N.Y.S.2d 69, 70 (Sup. Ct. 1943) (mortgagor not relieved from default in absence of waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by mortgagee).

[59] A foreclosure without right includes those foreclosures that would be wrong and ineffective regardless of the manner in which the foreclosure was executed. *See* Garrett v. Crawford, 128 Ga. 519, 57 S.E. 792, 793-94 (1907) (damages will lie for wrongful foreclosure when there has been an unauthorized exercise of foreclosure power); Santler v. Green, 287 Mass. 404, 192 N.E. 39, 40 (1934) (wrongful foreclosure exists when there has not been a breach of any condition of the mortgage); Rogers v. Barnes, 169 Mass. 179, 47 N.E. 602, 603-04 (1897) (damages for wrongful foreclosure will lie when a foreclosure is exercised in

conduct, bad faith, or negligence on the part of the mortgagee, the foreclosure may be deemed wrongful and a right of action will lie for the mortgagor.[60] When a mortgage or deed of trust is wrongfully foreclosed, the injured mortgagor has alternative remedies: he may treat the sale as void and sue in equity to have the wrongful foreclosure set aside, or he may let the foreclosure sale stand and sue to recover damges suffered as a result of the wrongful foreclosure.[61]

The court in the instant case held that the second foreclosure was wrongful because of National's unconscionable conduct. The majority noted that Williams' "financial plight"[62] was due solely to National's initial wrongful foreclosure.[63] The court also noted that the true amount of the indebtedness had not been indicated in the notices sent by National to the mortgagor.[64]

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the absence of breach of a condition); Dennett v. Codman, 168 Mass. 428, 47 N.E. 131, 131 (1897) (a mortgagee's negligence or misconduct in the exercise of power of sale renders the foreclosure sale invalid).

[60] Unconscionability, bad faith, negligence, oppressive conduct and fraud have all been held to give rise to a cause of action for wrongful foreclosure regardless of whether the mortgagor is actually in default. *See* Munger v. Moore, 11 Cal. App. 3d 1, 89 Cal. Rptr. 323, 326 (1970) (mortgagor entitled to damages for an illegal, fraudulent or wilfully oppressive sale of property in a foreclosure attempt); Levine v. Reliance Coop. Bank, 301 Mass. 101, 16 N.E.2d 88, 89 (1938) (damages will lie for a foreclosure conducted negligently or in bad faith to the detriment of the mortgagor); Johnson v. Gore, 224 Miss. 600, 614, 80 So. 2d 731, 736 (1955) (mortgagor may be relieved of consequences of default where unconscionable act of mortgagee causes default); Chandler v. Howard, 312 S.W.2d 26, 33 (Mo. 1958) (foreclosure sale can be set aside if fraudulently brought); Ferlazzo v. Riley, 278 N.Y. 289, 16 N.E.2d 286, 287 (1938) (a mortgagor may be relieved in the event of unconscionable conduct).

[61] *E.g.*, National Life Ins. Co. v. Silverman, 454 F.2d 899, 905 (D.C. Cir. 1971); Royall v. Yudelevit, 268 F.2d 577, 580 (D.C. Cir. 1959); Sandler v. Silk, 292 Mass. 493, 198 N.E. 749, 751 (1935); Peterson v. Kansas City Life Ins. Co., 339 Mo. 700, 98 S.W.2d 770, 775 (1936); Brown v. M&J Fin. Corp., 269 N.C. 255, 152 S.E.2d 97, 99 (1967).

In the instant case, the Mississippi Supreme Court stated that in an action for wrongful foreclosure, the principles denoted under both actions at law and at equity will apply to each case. National Mortgage Co. v. Williams, 357 So. 2d 934, 937 (Miss. 1978).

[62] Williams' financial trouble developed because she had made no payments on her monthly installments since the first controversy arose. Part of each payment, $66.69, was being paid under an FHA § 235 certification. Since Williams had been forced to wait so long in making payments, she was notified that her FHA certification had expired six days after the second foreclosure proceeding began. Williams could have had the certification reinstated retroactively to the expiration date if she had mailed the reinstatement request promptly. 357 So. 2d at 937.

[63] *Id.* Since Williams' financial plight was a result of National's misconduct, the court held a foreclosure would be unconscionable. *Id.*

[64] The court cited an earlier Mississippi case, Johnson v. Gore, 224 Miss. 600, 80 So.

A dissent argued that the motives of the mortgagee and the hardship of the mortgagor were irrelevant[65] in a foreclosure proceeding.[66] Furthermore, the dissent pointed out, the notices sent to Williams' attorney helped to determine the amount required to prevent foreclosure.[67] The dissent concluded that the conduct of the mortgagee was not unreasonable, that the foreclosure was valid, and that the majority was effectively relieving the mortgagor of her obligation.[68]

In reviewing the facts of the instant case, one is inclined to view the second foreclosure as a result not only of the previous wrongful conduct of the mortgagee but also of the inaction of the mortgagor's attorney. Thus, a dilemma arises because, while a mortgagee should not be able to take advantage of his own misconduct, a mortgagor similarly should not be accorded relief for questionable acts by one other than the mortgagee that lead to a foreclosure.[69] In addition, a recent Delaware case involving similar facts[70] reached a result different from that settled upon by the Mississippi Supreme Court. The Delaware court held that a second foreclosure proceeding was not precluded by a previous pend-

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2d 731 (1955), to support the reasoning that adequate notice of the amount of debt due was necessary before foreclosure proceedings could begin. Although *Johnson* was a suit in equity to set aside a foreclosure, the *Williams* court concluded that the same principles applied in equity in *Johnson* also apply in actions at law to recover damages for wrongful foreclosure. 357 So. 2d at 937-38.

[65] The motive or purpose in foreclosing upon default should be irrelevant. *See* Fleming v. Done, 304 Mass. 46, 22 N.E.2d 609, 612 (1939) (right to foreclose mortgage in default exists regardless of motive); Owens v. Owens, 347 Mo. 80, 146 S.W.2d 569, 577 (1941) (motive, intention, or purpose of payee in foreclosing the deed of trust were immaterial to the validity of the foreclosure sale).

The hardship imposed by foreclosure upon the mortgagor has also been held to be an irrelevant consideration in determining whether foreclosure was wrongful. *See* Lavretta v. First Nat'l Bank, 178 So. 3, 11 (Ala. 1937) (mortgagee may foreclose regardless of hardship); Federal Home Loan Mortgage Corp. v. Taylor, 318 So. 2d 203, 207 (Fla. 1975) (right to foreclose is not contingent on mortgagor's health, good fortune, ill fortune, or other personal circumstances affecting ability to pay).

[66] National Mortgage Co. v. Williams, 357 So. 2d 934, 939 (Miss. 1978) (Smith, J., dissenting).

[67] Justice Smith included copies of both notices in his opinion to point out that an offer to help in discerning the amount of the debt was made by National. *Id.* at 939.

[68] *Id.* at 939-40.

[69] The failure of a mortgagor's attorney to pay the amount due has been held not to be attributable to a mortgagee so as to render a foreclosure invalid. Hayward Farms Co. v. Union Sav. Bank & Trust Co., 194 Minn. 473, 260 N.W. 868, 869 (1935).

[70] Clark v. Equitable Life Assurance Soc'y, 316 A.2d 554 (Del. 1974).

ing foreclosure action where the second action was based upon a default in payments subsequent to a default in the first action.[71] If a reasonable attempt had been made by Williams' attorney to contact National about the obligation due, the majority's opinion could more easily be justified. Under the court's ruling, National could not use its security in Williams' property to satisfy a past due outstanding debt without the action's being considered unconscionable.

IV. Dragnet Clause

During 1978 the Mississippi Supreme Court once again faced the problem of discerning the limits of power of the all-encompassing dragnet clause.[72] In *Amos v. Lance,*[73] the court decided whether a bank could rely on a dragnet clause in a deed of trust to foreclose on property in one county solely on the basis of an unliquidated deficiency resulting from a previous foreclosure sale on property owned by the mortgagor in another county, where the deficiency had not been reduced to a judgment. In *Amos*, the appellee, Lance, had executed a deed of trust containing the dragnet clause[74] covering land in DeSoto County, Missis-

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[71] *Id.* at 554. The Delaware court found no reason to prohibit a second foreclosure subsequent to an earlier alleged default that had resulted in a foreclosure.

[72] Although the Mississippi Supreme Court has been faced with litigation concerning future advance provisions on numerous occasions, it first applied the term "dragnet clause" to describe a particular type of future advance provision in 1953. Walters v. Merchants & Mfrs. Bank, 218 Miss. 777, 783, 67 So. 2d 714, 717 (1953). Since then, the court has faced some tough questions concerning the validity of dragnet clauses. *See* Newton County Bank v. Jones, 299 So. 2d 215, 219-20 (Miss. 1974) (dragnet clause covered advance made to one spouse against homestead); Hudson v. Bank of Leakesville, 249 So. 2d 371, 374 (Miss. 1971) (dragnet clause did not secure advance made by grantor to a third party); Holland v. Bank of Lucedale, 204 So. 2d 875, 877 (Miss. 1967) (dragnet clause covered subsequent advances made to son); Walters v. Merchants & Mfrs. Bank, 218 Miss. 777, 784-85, 67 So. 2d 714, 717-18 (1953) (advance under dragnet clause upheld).

[73] 355 So. 2d 84 (Miss. 1978).

[74] The deed of trust contained two provisions intended to make the deed of trust security for any of Lance's obligations:

> Whereas, the said grantor desires to secure prompt payment at maturity of the aforesaid indebtedness, as well as any extension of the same, or any part thereof, and any other or future indebtedness in the way of future advances hereunder, or otherwise, the grantor, or either of them may now or hereafter owe the beneficiary as hereinafter provided . . . .

Brief for Appellant at 4-b, Amos v. Lance, 355 So. 2d 84 (Miss. 1978).

> In addition to the above, it is intended that this conveyance shall secure and it does secure any and all debts, obligations or liabilities direct or contingent of

sippi, to the appellant bank.[75] Lance was obligated to the bank as either maker or endorser on notes executed both prior and subsequent to the execution of the relevant deed of trust. Lance was also a co-maker on a promissory note in favor of the bank that was secured by a deed of trust on land in Panola County, Mississippi.[76] Following default and foreclosure on the Panola County land, the bank did not seek a deficiency judgment.[77] When Lance later attempted to pay his past debts to prevent foreclosure on the DeSoto County property, the bank refused to accept the payments, stating that it considered the dragnet clause adequate to secure not only all notes executed by Lance to the bank, but also the unsettled deficiency from the foreclosure sale on the Panola County property.[78] Citing no authority other than the chancellor's opinion,[79] the Mississippi Supreme Court held that the deficiency from the previous foreclosure that had not been reduced to a liquidated claim by judicial determination could not be the sole basis for foreclosure of the deed of trust on other land containing a dragnet clause.[80]

As a general rule a mortgage[81] does not secure debts and obligations not contemplated by the parties to be secured thereby.[82] Under a dragnet clause, however, the mortgagee at-

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the grantor herein, or either of them, to the beneficiary, whether now existing or hereafter arising at any time before actual cancellation of this instrument on the public records of mortgages and deeds of trust, whether the same be evidenced by note, open account, overdraft, endorsement, guaranty, or otherwise.

Amos v. Lance, 355 So. 2d 84-85 (Miss. 1978).

[75] The deed of trust originally secured a promissory note of $6120 payable in monthly installments of $170. Amos v. Lance, 355 So. 2d 84, 85 (Miss. 1978).

[76] Lance personally endorsed a $60,000 note made by M.B.J. Company, Inc. in favor of the Bank of Mississippi. *Id.* at 85-86.

[77] At the time of foreclosure, the bank alleged that a total of $65,615 was owed on the note. This amount included principal, accrued interest, foreclosure fees and costs. The bank purchased the property at the foreclosure sale for $15,000 and then alleged a $50,615 deficiency. *Id.* at 85.

[78] The court concluded that the bank foreclosed solely on the basis of the deficiency rather than upon the other delinquent notes. *Id.* at 86.

[79] Without producing authority or reasoning the court merely stated that it agreed with the DeSoto Chancery Court's holding. *Id.* at 86-87.

[80] *Id.*

[81] The term "mortgage" includes "deed of trust" for the purpose of this discussion.

[82] *See* Weatherwax v. Heflin, 244 Ala. 210, 12 So. 2d 544, 562 (1943) (subsequent notes not in contemplation of parties at time of execution of mortgage not secured thereby); Belton v. Farmers & Merchants Bank & Trust Co., 186 N.C. 613, 120 S.E. 220, 221 (1923) (anything not within contemplation of parties is not included in an agreement to secure obligations).

tempts to secure all obligations of the mortgagor that have or may become owing to the mortgagee.[83] Dragnet clauses are, therefore, the most extreme form of future advance provisions[84] and are often referred to as anaconda clauses since "by their broad and general terms they enwrap the unsuspecting debtor in the folds of indebtedness embraced and secured in the mortgage which he did not contemplate."[85] While the validity of future advance provisions has been firmly established,[86] the dragnet clause[87] is generally viewed with disfavor, carefully scrutinized, and strictly construed.[88] In determining the validity and coverage of a dragnet

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[83] In a true dragnet clause, the mortgagee attempts to use the mortgage to cover all obligations the mortgagor may owe to the mortgagee regardless of the nature of the debt or how it is created. *See* First v. Byrne, 238 Iowa 712, 28 N.W.2d 509, 512-13 (1947) (definition of what dragnet clause entails); 2 G. GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY § 35.2, at 917-18 (1965) (under a dragnet clause it is possible that a landlord's claim may in no sense be related to the financing transaction).

[84] It has been suggested that there are four basic categories of future advance provisions:

> First, the mortgage may purport to secure a definite amount of money without mentioning future advance, but only a portion of that amount will be presently transferred. . . . Second, the mortgage may expressly secure obligatory future advances, whereby the mortgagee will have an enforceable contractual obligation to make advances in the future. Third, the mortgage may expressly secure optional future advances whereby the mortgagee in his discretion may make advances to the mortgagor upon request. . . . Fourth, the mortgage may expressly secure optional future advances whereby the mortgagee may make advances as he deems necessary to protect his interest or to preserve the value of the security without the consent of the mortgagor.

Comment, *Mortgages to Secure Future Advances: Problems of Priority and the Doctrine of Economic Necessity,* 46 MISS. L.J. 433, 434-35 (1975).

[85] Berger v. Fuller, 180 Ark. 372, 21 S.W.2d 419, 421 (1929).

[86] *See* Gray v. Helm, 60 Miss. 131, 141 (1882) ("[S]uch a mortgage, when recorded operates to secure the mortgagee against the claims of third persons in whatever advances are made under it, whether before or after the maturity of the principal debt secured"). The validity of mortgages to secure future advances is fully recognized throughout the United States. *See* 1 L. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 447, at 573 (8th ed. 1928); Blackburn, *Mortgages to Secure Future Advances,* 21 MO. L. REV. 209, 215 n.27 (1956).

For a discussion of the advantages of a mortgage to secure future advances, see Comment, *supra* note 84, at 435-36.

[87] The Mississippi Supreme Court has been accused of ignoring the technical difference between a dragnet clause and a future advance provision. *See* 46 MISS. L.J. 169, 172-73 n.19, 178 (1975).

[88] *See* Akamime & Sons, Ltd. v. American Sec. Bank, 50 Haw. 304, 440 P.2d 262, 267-68 (1968) (court would not assist in allowing dragnet clause to reduce borrower to the status of economic serf); First v. Bryne, 238 Iowa 712, 28 N.W.2d 509, 511 (1947) (dragnet clauses are not highly regarded in equity and should be carefully scrutinized and strictly

clause the court's overriding concern is upon ascertaining the intention of the parties.[89] As for the basic concept of the all-inclusive dragnet clause, the Mississippi Supreme Court has noted that case law in this state has established that dragnet clauses "would be enforceable if properly executed and stated in clear and unambiguous language."[90] Indeed, the Mississippi court has upheld a dragnet clause containing language similar to the clause contested in the instant case.[91]

If a dragnet clause is worded broadly enough to secure all debts, additional security will not defeat the authority of the mortgage.[92] The Mississippi court has even held that a dragnet

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construed); Hudson v. Bank of Leakesville, 249 So. 2d 371, 374 (Miss. 1971) (dragnet clause will not secure third party debt unless language is clear and unmistakable).

The effect of the dragnet clause has been limited in many jurisdictions, including Mississippi. The Mississippi court has ruled that before a dragnet clause can secure a third party debt, it must be spelled out in the clearest of terms and expressly called to the mortgagor's attention. Hudson v. Bank of Leakesville, 249 So. 2d 371 (Miss. 1971); *see* Berger v. Fuller, 180 Ark. 372, 21 S.W.2d 419, 421 (1929) (meaning of dragnet clause must be absolutely clear before it can secure a third party debt). More than one-third of the states have statutes which in some manner restrict future advance provisions. 46 Miss. L.J. 169, 171 n.12 (1975).

[89] *See, e.g.*, Monroe County Bank v. Qualls, 220 Ala. 499, 125 So. 615, 616 (1929).

[90] Newton County Bank v. Jones, 299 So. 2d 215, 219 (Miss. 1974).

[91] Walters v. Merchants & Mfrs. Bank, 218 Miss. 777, 67 So. 2d 714 (1953). In *Walters* the deed of trust contained the following clause:

> Whereas, the said Grantors desire to secure the prompt payment at maturity, of the said indebtedness, as well as any extension of the same or any part thereof, and any other or future indebtedness that they or either of them may incur with or owe to the said Beneficiary, as hereinafter provided. . . . In addition to the aforesaid indebtedness and any and all extensions or renewals of the same or any part thereof, this instrument is intended to secure and does secure any and all debts that the said Grantors or either of them may incur with or owe to the said Beneficiary within 10 years from the statutory limitation of the within instrument from the date hereof, whether the same be evidenced by note, open account, assignment, endorsement, or otherwise.

Id. at 783, 67 So. 2d at 717.

[92] *See* Anglo-California Bank v. Cerf, 147 Cal. 384, 81 P. 1077, 1080 (1905) (debt secured by other security is within scope of mortgage with dragnet clause); Exchange Trust Co. v. Hitchcock, 249 Mass. 547, 144 N.E. 373, 374 (1924) (mortgage covered note subsequently executed by mortgagor and secured by another collateral); Newton County Bank v. Jones, 299 So. 2d 215, 218 (Miss. 1974) (additional security does not defeat language of dragnet clause); Baker v. Building & Loan Ass'n, 168 Miss. 808, 815-17, 152 So. 288, 290 (1934) (mortgage secured a balance owing under another mortgage after its foreclosure); Northampton Nat'l Bank v. Holland, 126 Pa. Super. 597, 190 A. 483, 485 (1937) (clause held to cover note with additional security). *But see* Page v. American Bank of Commerce & Trust Co., 167 Ark. 607, 269 S.W. 561, 561-62 (1925) (dragnet clause held not sufficient to secure independent loan secured by other mortgage).

clause is sufficient to secure a balance owing under a mortgage after foreclosure.[93] Additionally, a mortgage can secure future endorsements. It must be remembered, however, that whether a dragnet clause covers a secondary liability such as an endorsement depends upon the intention of the parties as evidenced by the wording of the clause.[94] Nevertheless, the debts of an endorser on the notes of others owing to the mortgagee are usually covered by a dragnet clause.[95]

Accepting the principle that the dragnet clause covers the endorsed and separately secured note, the remaining question is whether a judicial determination of the balance of the deficiency is necessary before institution of foreclosure actions. In *Baker v. Building & Loan Association,*[96] where foreclosure had been allowed on the balance owing under a previously foreclosed mortgage, a "judgement at law" determining the balance had been given.[97] In addition, the foreclosure was based on a dragnet provision specifically providing that any additional security would not effect a waiver upon the mortgage.[98]

Although the supreme court held in *Amos* that a judgment at law concerning the balance of the deficiency was a prerequisite to a valid foreclosure proceeding and that the balance presented by the Bank of Mississippi was "arbitrary" and "unliquidated,"[99] a good argument to the contrary can be made. First, in a suit for a deficiency judgment the determination of the balance due involves nothing more than the use of a fixed mathematical process; it is not even a question for the jury.[100] The judge determines the

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[93] Baker v. Building & Loan Ass'n, 168 Miss. 808, 815-17, 152 So. 288, 290 (1934).

[94] *See* Hollan v. American Bank of Commerce & Trust Co., 168 Ark. 939, 272 S.W. 654, 655 (1925) (the language of the clause showed that the parties intended or "meant" to include the debt by endorsement within the coverage of the mortgage).

[95] *See* Kesling v. Bank of America Nat'l Trust & Sav. Ass'n, 449 F.2d 770, 771 (9th Cir. 1971) (owners became liable under guarantee secured by trust deed through dragnet clause); Citizens & S. DeKalb Bank v. Hicks, 232 Ga. 244, 206 S.E.2d 22, 24 (1974) (personal guarantee created debt to be tacked on the original deeds to secure debt under the dragnet clause); National Acceptance Co. v. Exchange Nat'l Bank, 101 Ill. App. 2d 396, 243 N.E.2d 264, 268 (1968) (trust deed dragnet clause secured indebtedness arising under defendant's guarantee).

[96] 168 Miss. 808, 152 So. 288 (1934).

[97] *Id.* at 812, 152 So. at 289.

[98] *Id.* at 814, 152 So. at 289.

[99] 355 So. 2d at 86.

[100] Smith v. General Inv., Inc., 246 Miss. 765, 769, 150 So. 2d 862, 864 (1963).

balance due, including interest and any costs. It can therefore be argued that this sum represents liquidated damages.[101] Second, in the absence of a charge of fraud or misrepresentation, a party may not challenge the validity of a deficiency suit on the ground that the price for which the security was sold at the foreclosure sale was inadequate.[102] These two propositions illustrate that requiring a judicial determination of deficiency before allowing a second foreclosure, as was done in *Baker*,[103] is a waste of time and money because a liquidated deficiency can be established without a judicial determination.[104]

Many jurisdictions severely circumscribe use of the dragnet clause to prevent exactly what was attempted in the present case.[105] Perhaps the court should have followed its lead in *Hudson v. Bank of Leakesville*[106] by requiring the mortgagee to state specially that the mortgage covered any deficiency on obligations with additional security, and by further requiring that the mortgagee explain the situation to the mortgagor; these are the facts underlying the *Baker* decision.[107] An even better solution, however, would be for the state legislature to follow the lead of other states in enacting legislation describing and limiting the boundaries of future advance provisions.[108]

V. Landlord and Tenant

The 1978 Mississippi Supreme Court faced an issue in landlord-tenant law that has been theoretically troublesome for

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[101] This was part of the argument espoused by the appellant in *Amos*. Brief for Appellant at 18-b, Amos v. Lance, 355 So. 2d 84 (Miss. 1978).

[102] *See* Walton v. Washington County Hosp. Ass'n, 178 Md. 446, 13 A.2d 627, 629 (1940) (defense of inadequacy of price cannot be raised in proceedings subsequent to confirmation of foreclosure sale); Smith v. General Inv., Inc., 246 Miss. 765, 769, 150 So. 2d 862, 864 (1963) (when sued for a deficiency one cannot set up as a defense that property sold in foreclosure was sold for an inadequate price); Anderson v. Walsh, 109 Neb. 759, 192 N.W. 328, 329 (1923) (defense of inadequacy of price cannot be offered in deficiency judgment proceeding).

[103] Baker v. Building & Loan Ass'n, 168 Miss. 808, 152 So. 288 (1934).

[104] This public policy argument was also advanced by the appellant. Brief for Appellant at 18-b through 20-b, Amos v. Lance, 355 So. 2d 84 (Miss. 1978).

[105] See note 88 and accompanying text *supra*.

[106] 249 So. 2d 371 (Miss. 1971).

[107] Baker v. Building & Loan Ass'n, 168 Miss. 808, 152 So. 288, 288-89 (1934).

[108] Over one-third of the states have restricted by statute the use of future advance provisions. *See* 46 Miss. L.J. 169, 171 n.12 (1975).

many modern courts[109]—the liability of a landlord, under a general covenant to repair,[110] to a tenant's invitee for a defect in the premises. In *Hurst v. English,*[111] English[112] was injured when, upon opening a screen door, he was hit in the eye by a defective spring that broke.[113] Hurst and his wife owned the building.[114] In the lease, Hurst had agreed to maintain the building in "good condition."[115] During the leasehold, Hurst had made many repairs and had frequently checked on the condition of the store.[116] In fact, Hurst had replaced the spring "a year or two previously."[117]

In deciding the case, the supreme court noted the common law rule that a lease operates as a sale or conveyance for a period of time and that the lessor usually has no right of possession or use in the property.[118] The court then held that although the lessor was obligated under a general agreement to make repairs, since he had not reserved a right in the lease to enter the premises for general maintenance or repair, proof of actual or constructive notice to the lessor of the need for repair was required to raise an obligation on his behalf.[119] Finding that Hurst neither had actual

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[109] *See generally* Annot., 17 A.L.R.3d 873 (1968); Annot., 17 A.L.R.3d 422 (1968); Annot., 78 A.L.R.2d 1238 (1961); Annot., 163 A.L.R. 300 (1946); Annot., 8 A.L.R. 765 (1920).

[110] The lease in the instant case provided that the lessor would "as soon as possible and not later than 45 days from the above date, repair windows, doors, front of building, paint building and keep same in good condition." Hurst v. English, 357 So. 2d 132, 133 (Miss. 1978).

[111] 357 So. 2d 132 (Miss. 1978).

[112] English was less than two years old when injured. *Id.* at 133.

[113] The child opened the screen door until it almost touched the outside wall of the building, stretching the spring past its maximum elasticity. The piece of flying spring pierced the boy's eye. *Id.*

[114] The Kitchens, lessees of the building, operated a paint store upon the leased premises. *Id.*

[115] *Id.* See note 110 *supra.*

[116] Hurst occupied an office building next to the paint store. There was evidence that Hurst observed the building "almost daily" and that repairs had been made even without complaint or request from the tenant. Brief for Appellant at 5, Hurst v. English, 357 So. 2d 132 (Miss. 1978).

[117] 357 So. 2d at 133. The spring was rusty. There was no overhang on the roof to protect the spring from being rained on. Brief for Appellee at 2, Hurst v. English, 357 So. 2d 132 (Miss. 1978). Because of the probability of metal's rusting when rained on, it could be argued that Hurst had constructive knowledge of the probable existence of the defect.

[118] 357 So. 2d at 134.

[119] *Id.* (citing, 3A A. CORBIN, CONTRACTS § 75 (1960)).

notice nor "should have had knowledge"[120] of the defect, the court determined that Hurst was entitled to a peremptory instruction.[121]

Since a lease has historically been viewed as a sale of an interest in land,[122] the doctrine of caveat emptor, which originally was applied only to sales, has been applied to the landlord-tenant relationship.[123] Under this doctrine the lessor is not subject to liability for premises leased in a dangerously defective condition since the lessee is charged with the duty to check the condition of the premises before executing the lease.[124] In addition, the general rule is that the lessor has no obligation to keep the premises in repair in the absence of an express agreement[125] or statutory

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[120] 357 So. 2d at 134.

[121] *Id.*

[122] A lessee was originally regarded as having only a personal right against the lessor rather than an enforceable property right in the land. Later, as a result of remedies created for the lessee, his interest became enforceable in rem, proprietary, and was eventually treated as a sale or conveyance of the premises for a term. Harkrider, *Tort Liability of a Landlord,* 26 MICH. L. REV. 260, 261 (1928). *See* 3A G. THOMPSON, LAW OF REAL PROPERTY § 1230 at 129 (1959); Note, *Personal Injuries to the Tenant; The Landlord's Liability in Tort Therefor,* 10 S.C.L. REV. 307, 307 (1958).

Mississippi has long recognized that a lease should be treated as a conveyence. *E.g.,* Standard Fruit & Steamship Co., 290 So. 2d 612, 615 (Miss. 1974); Strand Enterprises v. Turner, 223 Miss. 588, 603, 78 So. 2d 769, 773 (1955).

[123] Numerous jurisdictions have recognized that the doctrine of caveat emptor applies to a lease. *See* Lindsey v. Kentucky Dev. Co., 291 Ky. 253, 163 S.W.2d 499, 500 (1942) (caveat emptor requires that the lessee take the risk of condition); Cowen v. Sunderland, 145 Mass. 363, 14 N.E. 117, 118 (1887) (caveat emptor requires lessee to make an examination); Rich v. Swalm, 161 Miss. 505, 516, 137 So. 325, 326 (1931) (caveat emptor requires that the tenant take the premises in whatever condition he finds them); Hamblen v. Mohr, 171 S.W.2d 168, 174 (Tex. 1943) (general rule that tenant takes premises as they are). *See generally* Harkrider, *supra* note 122. For the origin and development of the doctrine of caveat emptor, see Hamilton, *The Ancient Maxim Caveat Emptor,* 40 YALE L.J. 1133 (1931).

[124] *See* Daulton v. Williams, 81 Cal. App. 2d 70, 183 P.2d 325, 328 (1947) (tenant should use reasonable care and diligence to inspect property); Holghauer v. Sheeny, 31 Ky. 1238, 104 S.W. 1034, 1035 (1907) (tenant takes premises as he finds them); Cowen v. Sunderland, 145 Mass. 363, 14 N.E. 117, 118 (1884) (lessee takes the risks of the quality of the premises); Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126, 127 (1889) (lessee must run the risk of the condition of real property).

[125] *See* Fishscher v. Collier, 143 So. 2d 710, 712 (Fla. 1962) (generally agreed that landlord has no duty to repair); Hollywood Bldg. Corp. v. Greenview Amusement Co., 315 Ill. App. 658, 43 N.E.2d 566, 567 (1940) (no obligation to repair in the absence of an agreement to do so); DiMargo v. S&P Realty Corp., 364 Mass. 510, 306 N.E.2d 432, 434 (1974) (no agreement to repair will be implied); Miller v. Miller, 217 Miss. 650, 659, 64 So. 2d 739, 743 (1953) (at common law, the landlord was not obligated to repair).

Civil law developed differently from the common law. Under civil law, a lease was a

duty[126] to the contrary. Nevertheless, landlords bound by contract to make repairs have escaped liability in both tort and contract actions for personal injuries resulting from the landlords' failure to repair. The somewhat convoluted reasoning behind these decisions is that a tort action cannot be predicated upon a contract to repair,[127] and that liability for personal injuries is not within the contemplation of the parties at the making of the contract.[128] These rules have been applied to third party invitees since at common law an invitee stood in the shoes of the tenant.[129] The tenant was, therefore, the party to whom the invitee lawfully on the premises most logically turned to seek redress for his injuries since the landlord was in effect immunized from personal injury suits by the tenant.[130]

Numerous exceptions to the rule of landlord's immunity have developed,[131] and the modern trend is toward holding land-

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transfer of the benefit and enjoyment of the property and a landlord was under a duty to repair. *See* Viterbo v. Friedlander, 120 U.S. 707, 713 (1887) (on appeal from Circuit Court for the Eastern District of Louisiana) (lease is transfer of use of property and landlord is bound to keep it in repair).

[126] Generally, statutes imposing duties on the lessor fall into three categories; those requiring the premises to be kept in good repair by providing penalties on lessors who do not comply; those requiring premises intended for human habitation to be kept in good repair and upon failure to repair provide the option to make repair or to deduct costs from rent; and those providing for a remedy in tort where there is an injury due to a failure to make repairs. Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 HARV. L. REV. 669, 674-75 (1949).

[127] *E.g.*, Awad v. McColgan, 357 Mich. 386, 98 N.W.2d 571, 573 (1959); Houfburg v. Kansas City Stockyards Co., 283 S.W.2d 539, 543 (Mo. 1955); McCreech v. Howard R. Ware Corp., 53 N.Y.S.2d 192, 194 (1945); Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329, 333 (1932).

[128] *E.g.*, Murrell v. Crawford, 102 Kan. 118, 169 P. 561, 563 (1918); Spinks v. Asp, 192 Ky. 550, 234 S.W. 14, 15 (1921); Korach v. Loeffel, 168 Mo. App. 414, 151 S.W. 790, 792 (1913); Cooper v. Roose, 151 Ohio St. 316, 85 N.E.2d 545, 548 (1949).

The tenant had the following options if the landlord breached a specific duty to repair: (1) abandon the premises; (2) make the repairs and deduct the cost from rent; (3) recoup damages in an action for rent while living on the leased property in disrepair; or (4) sue for breach of contract. 3A G. THOMPSON, *supra* note 122, § 1236, at 189-90.

[129] *See* Shotwell v. Bloom, 60 Cal. App. 303, 140 P.2d 728, 729 (1943) (invitee stands in shoes of tenant and may recover if tenant could recover); Towne v. Thompson, 68 N.H. 317, 44 A. 492, 493 (1895) (third party's rights are subject to the same limitations as the tenant's).

[130] 3A G. THOMPSON, *supra* note 122, § 1241, at 222-23; *cf.* Midland Oil Co. v. Thigpen, 4 F.2d 85, 91 (8th Cir. 1925) (tenant in control of premises considered "owner"); Simms v. Kennedy, 74 Fla. 411, 76 So. 739, 740 (1918) (tenant is owner as far as third parties are concerned).

[131] For a discussion of the exceptions to landlord immunity, *see generally* W. PROSSER,

lords liable to tenants or tenants' invitees for injuries resulting from the landlord's breach of a covenant to repair.[132] This liability has been based on both contract[133] and tort[134] principles. The duty to make repairs arises, however, only where the landlord has notice of the defect[135] and has had a reasonable opportunity to repair it.[136] Moreover, under the "public use" rule, a landlord may be liable for an invitee's injuries caused by defects in the condition of premises leased for a public purpose.[137] This principle is based upon the theory that the landlord should be obligated to make repairs for the benefit of those members of the public who enter the property for the purpose for which it was leased.[138] The cause of action sounds in tort under either a negligence[139] or nuisance[140]

HANDBOOK OF THE LAW OF TORTS § 63 (4th ed. 1971); Harkrider, *supra* note 122; Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 HARV. L. REV. 669 (1949).

[132] For a discussion of the current charges in the landlord-tenant relationship, see Note, *Lessor's Obligation to Maintain a Habitable Dwelling: Enforcement by Lessee and Retaliatory Action by Lessor*, 36 LA. L. REV. 813 (1976); Comment, *The Landlord's Tort Liability for Injuries Caused by Defect Upon the Demised Premises*, 3 PEPPERDINE L. REV. 132 (1975).

[133] *E.g.*, Adler v. Miller, 218 Ala. 674, 120 So. 153, 154 (1928); Busick v. Home Owners Loan Corp., 91 N.H. 257, 18 A.2d 190, 191-92 (1941).

[134] *E.g.*, Barron v. Liedloff, 95 Minn. 474, 104 N.W. 289, 289-90 (1905); Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199, 202 (1958); DeClara v. Barber Steamship Lines, Inc., 309 N.Y. 620, 123 N.E.2d 871, 876 (1956); Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N.W. 489, 491 (1941).

[135] *E.g.*, Chambers v. Lindsey, 171 Ala. 158, 55 So. 150, 152 (1911); Cone v. Lawhorn, 61 Ga. App. 797, 7 S.E.2d 597, 599 (1940); Wolff v. Mauceli, 237 Miss. 378, 384, 114 So. 2d 845, 848 (1959); Gordon v. McAfee, 184 Misc. 469, 54 N.Y.S.2d 443, 445 (1945).

[136] *E.g.*, McNally v. Ward, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260, 268 (1961); Nimmo v. Harway, 23 Misc. 126, 50 N.Y.S. 686, 687 (1898); Asheim v. Fahey, 170 Or. 330, 133 P.2d 246, 247 (1943).

[137] The public use rule was first adopted in an 1874 New York case, Swords v. Edgar, 59 N.Y. 28 (1874). Although never expressly adopting this exception, the Mississippi Supreme Court employed it sub silentio in Standard Oil Co. v. DeCell, 175 Miss. 251, 267-68, 166 So. 379, 382 (1936). For cases construing the requirements of the public use exception see Annot., 17 A.L.R.3d 422 (1968).

[138] The public use rule normally is applied as of the time the premises are actually leased. The cases typically hold that if the landlord knew or should have known through the exercise of reasonable diligence of the existence of the defective conditions, then the landlord is liable for injuries to invitees injured on the premises. *See, e.g.*, Spain v. Kelland, 93 Ariz. 172, 379 P.2d 149, 151 (1963); Haynes v. Richfield Oil Corp., 38 Cal. 2d 375, 240 P.2d 580, 583 (1952); Colorado Mortgage & Inv. Co. v. Giacomini, 55 Colo. 540, 136 P. 1039, 1042-43 (1913); Marshall v. Mastodon, Inc., 51 A.D.2d 21, 379 N.Y.S.2d 177, 180 (1976).

[139] *E.g.*, Burroughs v. Ben's Auto Park, Inc., 27 Cal. 2d 449, 164 P.2d 897, 900 (1945); Austin v. Buottner, 211 Md. 61, 124 A.2d 793, 802-03 (1956).

rationale. The doctrine has also been applied in holding landlords liable under leases for numerous types of public places.[141]

In Mississippi, the development of exceptions to the common law rule of caveat emptor[142] has been somewhat confusing. The court has held that a landlord is not liable for personal injuries resulting from breach of a general covenant to repair.[143] When the covenant is specific, however, an action in tort or contract will

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Under the negligence rationale, the landlord has a duty to remedy any defects that a reasonable inspection would disclose. *E.g.*, Hilleary v. Earle Restaurant, 109 F. Supp. 829, 835 (D.D.C. 1952); Webel v. Yale Univ., 125 Conn. 515, 7 A.2d 215, 216 (1939). This duty is based on the fiction that, by inviting the public onto the premises, the landlord warrants the safety of the premises. *See* Annot., 17 A.L.R.3d 422, 431 (1968). The duty has also been held to exist where a lease was so short that control of the premises was never delivered to the tenant. *See, e.g.*, Oxford v. Leathe, 165 Mass. 254, 43 N.E. 92, 92-93 (1896) (four-day lease was so short that landlord was held liable for defect).

[140] Smith v. State, 92 Md. 518, 48 A. 92, 94 (1901); Bluemer v. Saginaw Cent. Oil & Gas Serv., Inc., 356 Mich. 399, 97 N.W.2d 90, 95-97 (1959).

[141] Corrigan v. Antupit, 131 Conn. 71, 37 A.2d 697, 698-99 (1944) (store); Webel v. Yale Univ., 125 Conn. 515, 7 A.2d 215, 217 (1939) (beauty parlor); Turner v. Kent, 134 Kan. 574, 7 P.2d 513, 515 (1932) (grocery store); Camp v. Wood, 76 N.Y. 92 (1979) (dance hall); RKO Midwest Corp. v. Berling, 51 Ohio App. 85, 199 N.E. 604, 606 (1935) (photographic studio); Yorkowsky v. Caldwell Store, Inc., 189 Pa. Super. 485, 151 A.2d 839, 842 (1959) (department store). *But see* Huey v. Barton, 328 Mich. 584, 44 N.W.2d 132, 134 (1950) (ladies' ready-to-wear shop); Antonsen v. Bay Ridge Sav. Bank, 266 A.D. 164, 41 N.Y.S.2d 629, 630 (1943) (store).

[142] *See* Rich v. Swalm, 161 Miss. 505, 516, 137 So. 325, 326 (1931) (the rule of caveat emptor applies and tenant takes premises as he finds them.)

[143] *Id.*, 137 So. at 327. In the last sentence in *Rich* the court quoted a Maryland case:

> We have no doubt . . . that no action, either in contract or in tort, by a tenant, or one of his family, against a landlord, to recover damages for personal injuries, should be sustained merely because the latter has been guilty of a breach of contract to make necessary repairs in the premises demised.

Id.

The Mississippi Supreme Court reaffirmed the *Rich* rule in 1970, when the court was faced again with a breach of a general covenant to repair. Quoting a 1955 case, Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 78 So. 2d 743 (1955), the court stated:

> [I]n covenanting to repair the leased premises, the parties do not contemplate that if the premises become defective through the landlord's failure to comply with his covenant, an accident to the tenant or to someone in privity with him will be the probable result of the breach, and hence damages for such an injury are not to be included in asserting the damages in an action for damages for breach of the covenant to repair.

Wilbourn v. Hardin, 234 So. 2d 606, 610-11 (Miss. 1970), *quoting* Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 642-43, 78 So. 2d 743, 747 (1955) (quoting 32 AM. JUR. *Landlord and Tenant* § 723, at 597-98 (1938)). See note 129 and accompanying text *supra*.

lie.[144] In any event, the court requires a showing of actual or constructive notice of the defect before the landlord may be held liable.[145]

The court's ruling in the instant case would be correct under an exception to the common law rules. Where jurisdictions allow any erosion of the landlord's immunity for breach of a covenant to repair, they invariably require notice of the defect before a duty arises.[146] There was no notice given in *Hurst*. Where jurisdictions apply the public use rule using the negligence rationale, the landlord is subject to the duty to make a reasonable inspection before leasing the premises.[147] Hurst had placed a new spring on the door shortly after execution of the lease[148] and had not noticed a defect in the spring even after subsequent daily inspections of the general condition of the store.[149] While the public use rule would shift the responsibility for maintaining safe conditions in this circumstance to the landlord, he in turn would still be allowed to shift the responsibility by contract. In any event, the one in the best position to keep the premises in a safe condition should be charged with the responsibility for maintenance and repair.

R. Barry Cannada

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[144] Hodges v. Hilton, 173 Miss. 343, 349, 161 So. 686, 687 (1935). In *Hodges* the court limited the holding in Rich v. Swalm, 161 Miss. 505, 137 So. 325 (1931), and allowed both an action ex contractu and ex delicto for personal injuries resulting from a specific covenant to repair. In Mississippi, therefore, it appears that a case is won or lost merely on the classification of a covenant as either general or specific.

[145] *See* Wolff v. Mauceli, 237 Miss. 378, 384, 114 So. 2d 845, 848 (1959) (actual or constructive notice is necessary to put the landlord in breach); Biloxi Realty Corp. v. Bittor, 227 Miss. 227, 233, 86 So. 2d 14, 16 (1956) (court pointed out that the landlord was given personal notice of the defective condition).

[146] See note 135 and accompanying text *supra*.

[147] See notes 116 & 117 and 138 & 139 and accompanying text *supra*.

[148] 357 So. 2d at 133.

[149] See notes 116 & 117 and accompanying text *supra*.

TORTS

Neither the Mississippi Supreme Court nor the state legislature was very active in the field of torts over the past year. Nonetheless, the year did produce the modification of several old doctrines[1] as well as the enactment of a progressive system through which a court may order restitution for victims of criminal acts.[2] In the commentary that follows, these major changes will be discussed and analyzed in light of both prior Mississippi law and possible complications that could arise from the changes.

I. Supreme Court Decisions

A. Landowner's Duty to Licensees and Invitees

Mississippi courts have long recognized the common law distinctions among invitees, licensees, and trespassers,[3] and the corresponding duties owed to each by a landowner with regard to conditions on the premises.[4] Under the common law rule a

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[1] *See* First Am. Nat'l Bank v. Mitchell, 359 So. 2d 1376, 1380 (Miss. 1978) (bank held liable for injuries caused by fraudulent activity of one of its officers); Hoffman v. Planters Gin Co., 358 So. 2d 1008, 1013 (Miss. 1978) (rejecting the common law status rules on entrants where entrant is harmed by active negligence of landowner); Vicksburg Chem. Co. v. Thornell, 355 So. 2d 299, 301 (Miss. 1978) (rejecting company's prescriptive rights defense to private nuisance cause of action by holding that the Mississippi Air and Water Pollution Control Act abolished prescriptive rights).

[2] H.R. 512, 1978 Miss. Leg., Reg. Sess., (enacted as Chapter 400, 1978 Miss. Laws) (codified at Miss. Code Ann. §§ 99-37-1 to -21 (Supp. 1978)). The provisions and possible effects of this bill will be discussed fully in the text. See notes 140 through 181 and accompanying text *infra*.

[3] *See generally* Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers* (pts. 1-2), 69 Law Q. Rev. 182, 359 (1953).

[4] *See* Allen v. Yazoo & M.V.R.R., 111 Miss. 267, 276, 71 So. 386, 388 (1916) (railroad is liable for injuries caused by dangerous conditions on its property only if it expressly or impliedly invites people onto the property); Ingram-Day Lumber Co. v. Harvey, 98 Miss. 11, 18-19, 53 So. 347, 348 (1910) (only duty company owed trespasser was to refrain from injuring him by willful and wanton misconduct); Illinois Cent. R.R. v. Arnola, 78 Miss. 787, 788, 29 So. 768, 768 (1901) (only duty owed licensee is duty to refrain from "a willful or wanton wrong"); Mackey v. Mayor of Vicksburg, 64 Miss. 777, 783, 2 So. 178, 180 (1887) (court recognized that trespasser is owed no duty by landowner). Since these early cases, the Mississippi Supreme Court has staunchly adhered to the common law rule. *See* General Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 107 (Miss. 1969) (invitee is owed duty of reasonable care to make premises safe for his entrance); Roberts v. Mississippi Power & Light Co., 193 Miss. 627, 638, 10 So. 2d 542, 544 (1942) ("owner of land owes no duty to trespassers or licensees except to refrain from willful or wanton injury"); Ness Creamer-

landowner owes an invitee the duty of reasonable care to make the premises safe,[5] but the only duty owed to an unknown licensee or trespasser is the duty to refrain from willfully or wantonly injuring him.[6] Within the past few years, however, use of the common law distinctions as a method for determining the standard of care owed by the landowner has come under increasing criticism.[7] Many courts have already begun to modify the old common law rule[8] while some courts have abolished the common

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ies v. Barthes, 170 Miss. 865, 872-73, 155 So. 222, 224 (1934) (landowner owed invitee-workers duty of reasonable care to prevent their injury from any defect in owner's property or equipment).

[5] White v. Great Atl. & Pac. Tea Co., 257 So. 2d 513, 515 (Miss. 1972) (invitee is entitled to reasonably safe premises while exercising reasonable care for own safety). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61, at 385-97 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 341, at 209, § 343, at 215-18 (1965).

[6] West v. Williams, 245 So. 2d 591, 592 (Miss. 1971); Wright v. Caffrey, 239 Miss. 470, 475, 123 So. 2d 841, 843 (1960). *See generally* W. PROSSER, *supra* note 5, § 58, at 362, § 60, at 376.

In some jurisdictions the common law duty owed to a licensee or a trespasser became greater at the time when the landowner obtained knowledge of the entrant's presence on the property. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 334-39, 341 (1965); Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 502-05 (1923); Peaslee, *Duty to Seen Trespassers*, 27 HARV. L. REV. 403 (1914). Other jurisdictions, however, followed the rule imposing liability only for willful or wanton misconduct, despite the owner's knowledge of the entrant's presence on the property. *See, e.g.*, Columbus Min. Co. v. Napier's Adm'r, 239 Ky. 642, 40 S.W.2d 285, 286 (1931); McIntyre v. Converse, 238 Mass. 592, 131 N.E. 198, 199 (1921); Rahe v. Fidelity-Philadelphia Trust Co., 318 Pa. 376, 178 A. 467, 468 (1935). As noted in the text, this rule was gradually weakened, and Mississippi was one of the last states to adhere to the "willful or wanton" test. *See* Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737, 739 (5th Cir. 1971) (owner or occupant of land owes licensee or trespasser only the duty of refraining from willfully or wantonly injuring him); Langford v. Mercurio, 254 Miss. 788, 799-800, 183 So. 2d 150, 154 (1966) (invitee who exceeds scope of invitation becomes a trespasser or gratuitous licensee and landowner's only duty is to refrain from willful or wanton injury). *But see* Gulf & I.R.R. v. Williamson, 162 Miss. 726, 732, 139 So. 601, 602 (1932) (upon discovering peril of trespasser on tracks, railroad is under a duty to give immediate warning and stop train).

[7] *See generally* Note, *Premises Liability: A Critical Survey of Indiana Law*, 7 IND. L. REV. 1001 (1974); Comment, *Liability of a Land Occupier to Persons Injured on His Premises: A Survey and Criticism of Kansas Law*, 18 U. KAN. L. REV. 161 (1969); Comment, *Trespassers, Licensees, and Invitees: Are the Distinctions Needed?*, 41 MISS. L.J. 562 (1970); Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186 (1957).

[8] *See* Schorah v. Carey, 331 A.2d 383, 384 (Del. 1975) (trespasser status of injured child does not absolve landowner from liability under the attractive nuisance doctrine); Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973) (modifying invitee status to include "licensees by invitation" and other social guests); Beechy v. Village of Oak Forest, 16 Ill. App. 3d 240, 305 N.E.2d 257, 259 (1973) (attractive nuisance doctrine, not common law

law distinctions entirely.[9]

The exception to the common law rule currently endorsed by a majority of courts is based upon a distinction between active and passive negligence.[10] Under this exception, the entrant's status is irrelevant if the entrant is injured as a result of some action or inaction[11] by the landowner because the landowner is consid-

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trespasser rule, establishes a landowner's duty with respect to child trespasser); Jones v. Billings, 289 A.2d 39, 43 (Me. 1972) (where presence of children on property is foreseeable, landowner's liability for injuries caused by conditions on the premises will be governed by the attractive nuisance doctrine instead of common law rule on trespassers); Bubalke v. Estate of Anthes, 189 Neb. 385, 202 N.W.2d 836, 840 (1972) (landowner's duty to child of tender years is governed by the attractive nuisance doctrine); Memel v. Reimer, 85 Wash. 2d 685, 538 P.2d 517, 519 (1975) (en banc) (duty owed to social guest licensee is to inform him of known dangerous conditions the licensee would not discover by himself). For a discussion of the active-passive negligence exception, see notes 10 through 13 and accompanying text *infra*.

[9] *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (en banc) (proper test in area of premises liability is whether owner managed his property as a reasonable person in view of the probability of injury to others); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308, 313-14 (1971) (en banc) (although status of entrant may have some bearing on duty he is owed by occupant, it is no longer determinative); Mariorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 333 A.2d 127, 133 (1975) (duty owed by occupant to entrant is based on test of reasonableness and will no longer be determined by the entrant's status).

[10] *See* Hix v. Billen, 284 So. 2d 209, 210 (Fla. 1973) (plaintiff entitled to recover from defendant where injury was caused by defendant's negligent act and not by condition on premises); Morris v. Atchison, Topeka & S.F. Ry., 198 Kan. 147, 154, 422 P.2d 920, 927 (1967) (recognizing that Kansas law has held occupant liable for injuries on the premises caused by the occupant's active negligence); Arbogast v. Terminal R.R. Ass'n, 452 S.W.2d 81, 84 (Mo. 1970) (en banc) (denying plaintiff-licensee recovery by finding that defendant's negligence was passive and the only duty owed was to refrain from willfully or wantonly injuring her). *See generally* W. PROSSER, *supra* note 5, § 60, at 379; James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954); 13 ST. LOUIS U.L.J. 449, 453 (1969).

[11] This is the one inconsistency in the "active-passive" test of a landowner's liability. It appears to be a contradiction in terms to say that a landowner is not liable for injuries caused by his passive negligence and then to hold him liable for injuries caused by his inaction. Courts have generally failed to recognize this contradiction. Instead of rephrasing the old "active-passive" test into new language to produce the same result, the courts seem to be content to use the old language, which fails to emphasize the distinction between injuries caused by a condition on the premises—"passive negligence"—and those caused by the negligence, whether active or passive, of the occupant. *See* Perry v. St. Jean, 100 R.I. 622, 218 A.2d 484, 485 (1966) (reversing and remanding defendant's sustained demurrer where declaration alleged that injury on premises was caused by defendant's negligence in saddling horse upon which plaintiff rode); Szafranski v. Radetzky, 31 Wis. 2d 119, 141 N.W.2d 902, 905 (1966) (allowing recovery where injury suffered on defendant's premises was caused by explosion which was the result of defendant's negligent storing of gunpowder). A better approach is to use a straight causation test, under which the court would first determine whether the condition of the premises that caused the injury was

ered to owe all entrants a duty of reasonable care with regard to activities on the premises.[12] Only if the injury results from the condition of the premises does the entrant's status become determinative of the possessor's liability.[13] Despite widespread acceptance of this rule,[14] the Mississippi Supreme Court prior to 1978 rejected several opportunities to adopt the rule,[15] and instead adhered to the old common law distinctions.[16]

In 1978, however, the Mississippi Supreme Court in *Hoffman v. Planters Gin Co.*[17] adopted the majority view. The plaintiff in *Hoffman* was a fourteen-year-old boy who was helping his father load cottonseed at the defendant's gin when he fell into a partially uncovered auger and as a result lost his leg just below the knee.[18]

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the result of some negligent act or omission by the occupant. If so, then the actual cause of the injury would be the occupant and the ordinary care test would govern. If the condition of the premises was not the result of the occupant's negligence, then the occupant's liability would be determined under the traditional rules. Although this test would produce the same results as those found in the cases, the courts would no longer have to worry about the semantic problems involved in referring to an occupant's inaction as active negligence. *See* Hardin v. Harris, 507 S.W.2d 172, 175 (Ky. App. 1974) (recognizing that the active-passive distinction is an artificial one that does not reach the ultimate issue of whether the injury was caused by a condition of the premises or the negligence of the owner).

[12] *See* Anderson v. Welty, 334 S.W.2d 132, 136-38 (Mo. App. 1960) (plaintiff injured by cattle driven through defendant's sale barn entitled to judgment where defendant failed to warn plaintiff of cattle drive); LeCompte v. Wardell, 134 Mont. 490, 333 P.2d 1028, 1030 (1959) (plaintiff injured by falling hoist was entitled to recover where hoist fell because of defendant's negligence in setting it up); Boardman v. McNeff, 177 Neb. 534, 129 N.W.2d 457, 461 (1964) (where plaintiff stepped between machinery on defendant's land to unfasten chain, owner of land was under duty of due care in controlling machinery so as to avoid injury to plaintiff).

[13] *E.g.*, Hix v. Billen, 284 So. 2d 209, 210-11 (Fla. 1973); Foster v. Harding, 426 P.2d 355, 360 (Okla. 1967); Collins v. Boeing Co., 4 Wash. App. 705, 483 P.2d 1282, 1289 (1971).

[14] See note 10 *supra*.

[15] *See* King v. Dudley, 286 So. 2d 814, 816 (Miss. 1973) (although the court recognized that invitee is entitled to recover where injury is caused not by a condition of the premises but by the defendant's negligence, it failed to recognize active-passive test specifically in licensee or trespasser cases); Braswell v. Economic Supply Co., 281 So. 2d 669, 672 (Miss. 1973) (court stated in invitee case that it was not ready to abandon the traditional distinctions between invitee, licensee, and trespasser); Astleford v. Milner Enterprises, Inc., 233 So. 2d 524, 525-26 (Miss. 1970) (court expressly refused to adopt active-passive distinction with regard to licensees and refused to allow recovery where defendant's affirmatively negligent acts were not willful and wanton).

[16] For a good discussion of the common law rules, see Comment, *The Outmoded Distinction Between Licensees and Invitees*, *supra* note 7, at 186.

[17] 358 So. 2d 1008 (Miss. 1978).

[18] *Id.* at 1009-10.

The trial court granted the defendant's peremptory instruction, ruling that the plaintiff was a licensee and that the evidence failed to show that the defendant had willfully and wantonly injured him.[19] The supreme court reversed and remanded on two grounds. First, the court held that the evidence presented a jury question concerning the status of the plaintiff-entrant.[20] Even though the presence of a jury question alone constituted grounds for reversing the granting of the peremptory instruction, the court went on to adopt the active-passive exception to the common law rule.

> We think the premises owner is liable for injury proximately caused by his affirmative or active negligence in the operation or control of a business which subjects either licensee or invitee to unusual danger, or increases the hazard to him, when his presence is known and that the standard of ordinary and reasonable care has application.[21]

Although Chief Justice Patterson dedicated much of his opinion to previous Mississippi decisions foreshadowing the active negligence/passive negligence distinction adopted in *Hoffman,*[22] he closed his opinion with quotations from sources discussing the general rule of law in this area.[23]

Despite the Chief Justice's reliance upon the general rule, it is possible that *Hoffman* does not make as great a change in current Mississippi law as an initial reading of the opinion seems to indicate. For example, the holding is restricted to those situations in which the owner is involved in the "operation or control of a business,"[24] which suggests that an individual homeowner can still rely on the traditional distinctions to protect himself from liability.[25] In addition, the holding restricts application of

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[19] *Id.* at 1011.

[20] *Id.*

[21] *Id.* at 1013.

[22] The court quoted the part of the opinion in Astleford v. Milner Enterprises, Inc., 233 So. 2d 524, 525-26 (Miss. 1970) in which Justice Inzer suggested that the active-passive distinction should be studied for possible use in the near future as an alternative to the common law rules. 358 So. 2d at 1012. The court also cited King v. Dudley, 286 So. 2d 814, 816-17 (Miss. 1973) which held the defendant liable for injuries to invitees on his premises that were caused by the occupant's affirmative negligence. 358 So. 2d at 1012.

[23] 358 So. 2d at 1013.

[24] See text accompanying note 23 *supra.*

[25] This situation represents a departure from the general use of the active-passive

the reasonable care standard to situations where the entrant's presence on the land is known to the possessor.[26] Thus, the traditional standards will govern liability unless the possessor is aware of the entrant's presence. Finally, the opinion extends the newly-adopted majority view only to situations involving licensees or invitees.[27] This limitation suggests that in Mississippi the common law rules concerning trespassers[28] may still be intact, despite the fact that the active-passive distinction has been generally applied to all classes of entrants.[29]

Regardless of these limitations, it is encouraging to see the supreme court abolish outdated distinctions that have for so long hindered meritorious claims.[30] Nonetheless, the court's decision in *Hoffman* leaves unattended the problem of status determinaton where the entrant is injured by the condition of the premises.[31] Several jurisdictions and many commentators have

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distinction since most states that adhere to the doctrine make it applicable to the homeowner as well as the businessman. *See* Swanson v. Shroat, 345 N.E.2d 872, 877 (Ind. App. 1976) (applying Indiana's "positive wrongful act" test to situation where young plaintiff fell out of neighbor's tree); Roster v. LaPlante, 244 A.2d 803, 805 (Me. 1968) (plaintiff is entitled to recover from defendant homeowner where injury on premises is caused by occupant's negligent acts); Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585, 589 (1974) (plaintiff on homeowner's premises is owed duty of due care by occupant in management of the property); Kaslo v. Hahn, 36 Wis. 2d 87, 153 N.W.2d 33, 35-36 (1967) (although active-passive distinction applies to homeowner, presence of shoescraper on patio is merely passive negligence).

[26] See text accompanying note 23 *supra.*

[27] *Id.*

[28] See note 6 *supra.*

[29] *See* Atlanta Funtown, Inc. v. Crouch, 114 Ga. App. 702, 152 S.E.2d 583, 585 (1966) (although occupant owes licensee and trespasser duty of due care after discovery of their presence, defendant here had no knowledge that plaintiff was in peril); Surratt v. Petrol, Inc., 160 Ind. App. 479, 312 N.E.2d 487, 494 (1974) (occupier owes discovered trespasser duty of reasonable care in not injuring him by active conduct); Dykes v. Alexander, 411 S.W.2d 47, 49 (Ky. App. 1967) (trespasser is owed duty of ordinary care with regard to occupant's active conduct after trespasser is discovered). *See generally* Peaslee, *supra* note 6.

[30] *See* Dry v. Ford, 238 Miss. 98, 101, 117 So. 2d 456, 457 (1960) (licensee not entitled to recover where his feet, which were sticking out from under a car he was working on, were run over by defendant's agent); Bishop v. Stewart, 234 Miss. 409, 415-16, 106 So. 2d 899, 901 (1958) (declaration alleging that plaintiff-licensee was injured by tripping over pipe stacked on defendant's property was insufficient to state cause of action); Kelley v. Sportsmen's Speedway, 224 Miss. 632, 643-45, 80 So. 2d 785, 790-91 (1955) (denying recovery by estate of boy killed by flying wheel in pit area).

[31] Under the active-passive distinction, the traditional rules govern injuries caused by passive negligence, the occupant's failure to remedy defects on the premises. *See* Hardin v. Harris, 507 S.W.2d 172, 175 (Ky. App. 1974) (passive negligence applies to

avoided this problem by abolishing[32] or advocating the abolition of[33] the common law distinctions, substituting a rule under which the possessor owes all entrants a duty of reasonable care. This rule appears, however, to be too drastic for a state such as Mississippi where the sovereignty of a landowner over his own property is so well recognized. A possible solution to the problem of determining an entrant's status is to merge the categories of invitee and licensee.[34] By merging these two categories, the supreme court would not only dispose of the gray area between invitee and licensee as a determining factor, but would also establish one standard of care owed by landowners to the great majority of entrants. Until the supreme court adopts such a policy, trial courts and attorneys in the state will be faced with cases where determination of the landowner's liability for conditions upon his property depends solely upon the facts of the case.

B. Prescriptive Rights in Nuisance Cases

In *Vicksburg Chemical Co. v. Thornell*[35] the Mississippi Supreme Court was faced with another case concerning the rights and liabilities of landowners when fifteen parties brought nuisance actions against Vicksburg Chemical for damages caused by air pollution.[36] The trial court consolidated the cases into three groups of five each.[37] After the jury awarded five identical $18,000 verdicts in the first group of cases, Vicksburg Chemical appealed claiming that the consolidation was improper and the verdicts

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injuries caused by condition of the premises); Foster v. LaPlante, 244 A.2d 803, 804 (Me. 1968) (passive negligence is negligence that allows the premises to fall into disrepair thereby yielding the condition which causes the injury); Arbogast v. Terminal R.R. Ass'n, 452 S.W.2d 81, 84 (Mo. 1970) (en banc) (passive negligence arises where occupant permits certain defects upon the property and the defects are the actual cause of the injury).

[32] See note 7 *supra.*

[33] *See generally* Hughes, *Duties to Trespassers: A Comparative Survey and Reevaluation,* 68 YALE L.J. 633 (1959); Wade, *Current Trends in Negligence Law,* 35 MISS. L.J. 270 (1964); Comment, *Trespassers, Licensees and Invitees: Are the Distinctions Needed?, supra* note 7; 25 VAND. L. REV. 623 (1972).

[34] This is not a novel solution. Other courts have adopted this position and it has been suggested by several commentators. *See* Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43, 51-52 (1973) (all people lawfully on property are entitled to duty of reasonable care). *See generally* 8 SUFFOLK L. REV. 795 (1974).

[35] 355 So. 2d 299 (Miss. 1978).

[36] *Id.* at 300.

[37] *Id.*

were excessive.[38] Rejecting the appellant's argument on consolidation, the supreme court affirmed the lower court's finding of liability but reversed and remanded on the issue of damages.[39] The court reasoned that the giving of five identical verdicts for parties in different situations indicated that the jury was confused and therefore unable to award a proper verdict.[40]

The importance of this case, however, lies in the court's discussion of the company's liability for damages caused by chemicals emitted during plant operations. The company claimed at trial that it had gained a prescriptive right to emit chemicals into the air and that the plaintiffs' suits for damages should therefore be denied.[41] The supreme court rejected this argument, finding that the Mississippi Air and Water Pollution Control Act[42] negated any prescriptive right that appellant could claim.[43] In so holding, however, the court may have unintentionally destroyed prescription as a defense to nuisance actions for damages.

In Mississippi,[44] as in most states,[45] a nuisance is classified

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[38] *Id.*

[39] *Id.* at 300-02.

[40] *Id.*

[41] *Id.* at 301.

[42] MISS. CODE ANN. §§ 49-17-1 to -43 (Supp. 1978).

[43] 355 So. 2d at 301.

[44] *Compare* Alfred Jacobhagen Co. v. Dockery, 243 Miss. 511, 518, 139 So. 2d 632, 634 (1962) (animal rendering plant constitutes private nuisance for which plaintiff is entitled to damages) *and* Laurel Equip. Co. v. Matthews, 218 Miss. 718, 722, 67 So. 2d 258, 260 (1953) (negligent distribution of paint onto plaintiff's adjacent premises is private nuisance) *with* State *ex rel.* Maples v. Quinn, 217 Miss. 567, 569, 64 So. 2d 711, 712 (1953) (fish reduction plant that causes odor extending several miles around plant is public nuisance) *and* Paramount-Richards Theatres, Inc. v. City of Hattiesburg, 210 Miss. 271, 280, 49 So. 2d 574, 579 (1951) (showing movies at prohibited times in violation of ordinance constitutes a public nuisance).

[45] *Compare* Baldwin v. McClendon, 292 Ala. 43, 288 So. 2d 761, 766 (1974) (maintenance of hog-raising operations by defendant constitutes private nuisance for which adjoining landowners are entitled to damages) *and* Claude v. Weaver Constr. Co., 261 Iowa 1225, 158 N.W.2d 139, 142-43 (1968) (defendant's maintenance of asphalt plant within two blocks of plaintiff's property is private nuisance) *and* Meat Producers, Inc. v. McFarland, 476 S.W.2d 406, 409 (Tex. Civ. App. 1972) (cattle-feeding facility which emits obnoxious odors is a private nuisance justifying award of permanent damages) *with* Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700, 706 (1972) (en banc) (cattle-feeding operations near large residential subdivision enjoined as public nuisance) *and* Dumont v. Speers, 245 A.2d 151, 155 (Me. 1968) (obstructions of navigable rivers without legislative authority is a public nuisance) *and* Bloss v. Paris Township, 380 Mich. 466, 157 N.W.2d 260, 262 (1968) (operation of drive-in theater in manner that exposes public to pictures of sex and human anatomy constitutes a public nuisance).

as public or private depending upon the type or scope of injury involved.[46] A private nuisance[47] is any activity that unreasonably interferes with another landowner's enjoyment of his property,[48] while a public nuisance is any interference with the rights of the public.[49] The distinction between a public nuisance and a private nuisance also governs the available remedy.[50] Although an injured

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The distinction between a public and a private nuisance at times appears vague. It should be noted that certain activities may constitute both a public and a private nuisance. *E.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700, 706 (1972) (en banc); Robie v. Lillis, 112 N.H. 492, 299 A.2d 155, 158 (1972); Ballenger v. City of Grand Saline, 276 S.W.2d 874, 875 (Tex. Civ. App. 1955).

[46] The basis of the distinction between a public nuisance and a private nuisance has always been vague. While some authorities base the distinction upon the type of injury involved, others claim that the distinguishing factor is the scope of the injury. *Compare* W. PROSSER, *supra* note 5, § 86, at 572 (distinction is based on the type of injury) *with* 58 AM. JUR. 2d *Nuisances* § 66, at 560 n.4 (1971) (difference between public and private nuisance is based on number of people affected by activity). Actually, the argument over whether scope or type of the injury is the distinguishing factor is useless since the terms signify the same situation. Assuming scope to be the distinguishing factor, a public right will have been infringed if numerous persons claim injury. Assuming type of injury to be the distinguishing factor, where a public right has been violated many persons have the right to claim injury. Therefore, the two terms signify similar situations, so that either may be classified as the distinguishing factor.

[47] For a good general discussion of Mississippi law in the area of private nuisance, see Comment, *Absolute Liability in Mississippi Under the Theory of Nuisance*, 42 MISS. L.J. 488 (1971).

[48] Iafrate v. Ramsden, 96 R.I. 216, 190 A.2d 473, 476 (1963); Abdella v. Smith, 34 Wis. 2d 393, 149 N.W.2d 537, 539 (1967). *See generally* C. MARTZ, RIGHTS INCIDENT TO POSSESSION OF LAND § 28.23 (1954); W. PROSSER, *supra* note 5, § 89.

The Mississippi law concerning private nuisance follows the general rules. *See* Love Petroleum Co. v. Jones, 205 So. 2d 274, 275 (Miss. 1967) (permitting oil and salt water to escape onto lands of another creates private nuisance); Williams v. Montgomery, 184 Miss. 547, 553, 186 So. 302, 305 (1939) (funeral home is private nuisance because it interferes with surrounding owner's right to enjoy property); American Sand & Gravel Co. v. Rushing, 183 Miss. 496, 502, 184 So. 60, 62 (1938) (owner must use his property so as not to damage property of another).

[49] *E.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700, 705 (1972) (en banc); Atlanta Processing Co. v. Brown, 227 Ga. 203, 179 S.E.2d 752, 758 (1971); Township of Garfield v. Young, 348 Mich. 337, 82 N.W.2d 876, 878-79 (1957). *See generally* C. MARTZ, *supra* note 48, § 28.23; W. PROSSER, *supra* note 5, § 88.

Again, the Mississippi law in this area is substantially similar to the general rules. *See* Paramount-Richards Theatres, Inc. v. City of Hattiesburg, 210 Miss. 271, 280, 49 So. 2d 574, 579 (1951) (activity that tends to disturb peace and welfare of society is a public nuisance); Dow v. Town of D'lo, 169 Miss. 240, 250, 152 So. 474, 476 (1934) (activity must affect rights enjoyed by citizens as part of public to be public nuisance).

[50] A party seeking judicial relief may be entitled to monetary damages for injuries caused by the nuisance, or an injunction to prohibit the activity. *See generally* W. PROSSER, *supra* note 5, § 90. A third remedy, abatement, also known as self-help, is a

party may recover damages from the defendant in a private nuisance action,[51] the only remedy allowed in a public nuisance action is an injunction abating the nuisance.[52]

The availability of the defense of prescriptive rights is also affected by the classification of the nuisance as public or private.

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nonjudicial action that allows a landowner to use reasonable force to end activity that impairs his enjoyment of his property. This action must be taken within a reasonable time after the landowner becomes aware of the nuisance. *See generally* C. MARTZ, *supra* note 48, § 28.34; W. PROSSER, *supra* note 5, § 90.

[51] *See* Nair v. Thaw, 156 Conn. 445, 242 A.2d 756, 761 (1968) (damages for private nuisance caused by noise); Kriener v. Turkey Valley Community School Dist., 212 N.W.2d 526, 537 (Iowa 1973) (damages awarded for private nuisance caused by nauseating odors from swamp); Cooper Tire & Rubber Co. v. Johnston, 234 Miss. 432, 437, 106 So. 2d 889, 890 (1959) (damages awarded for injury to plaintiff's property caused by emissions from rubber company); Nevada Cement Co. v. Lemler, 89 Nev. 447, 514 P.2d 1180, 1182 (1973) (damages awardable for discomfort caused by temporary nuisance).

A suit for damages is not the only remedy available to a party injured by an alleged private nuisance. In addition to the nonjudicial remedy of self-help discussed in note 59 *supra,* an individual may petition the court for an injunction against the private nuisance. *See* Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700, 706 (1972) (injunction granted where feedlot operation constituted both public and private nuisance); Nicholson v. Connecticut Half-Way House, Inc., 153 Conn. 507, 218 A.2d 383, 385 (1966) (injunction may issue where plaintiff can show potential irreparable damage to his property); Holmberg v. Bergin, 285 Minn. 250, 172 N.W.2d 739, 743-44 (1969) (court issued injunction ordering removal of tree from defendant's property where injury to plaintiff's property was irreparable and not compensable by money damages). In recent years, however, courts have shown a tendency to deny injunctive relief and instead award permanent damages where the activity in question has high social utility. *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 228, 257 N.E.2d 870, 873-74, 309 N.Y.S.2d 312, 319 (1970) (injunction dismissed and damages ordered where plant in question employed 300 people and had a value of $45,000,000). *See generally* Note, *An Economic Analysis of Land Use Conflicts,* 21 STAN. L. REV. 293 (1968).

[52] Although this proposition has never been specifically stated, it is inferable from the general rules of nuisance. Generally, the right to bring an action to enjoin or abate a public nuisance belongs solely to the state acting as the sovereign in protecting the rights of its citizens. *See* C. MARTZ, *supra* note 48, § 28.31; W. PROSSER, *supra* note 5, § 90, at 604. Since the state is acting to protect the rights of others, it has suffered no injury for which damages may be awarded. A private individual may also bring a suit to enjoin a public nuisance where he can show that the activity has caused him special injury. Pearman v. Wiggins, 103 Miss. 4, 13, 60 So. 1, 2 (1912); Bowlin v. George, 239 S.C. 429, 123 S.E.2d 528, 530 (1962); Roy v. Farr, 128 Vt. 30, 258 A.2d 799, 803 (1969). In addition, the plaintiff who has suffered special injury because of the activity is entitled to his civil remedy of damages against the guilty party. Raymond v. Southern Pac. Co., 259 Or. 629, 488 P.2d 460, 463 (1971). Therefore, in cases of public nuisance where the court awards damages to the plaintiff, the judgment is based on the plaintiff's private nuisance cause of action rather than the public nuisance cause of action. This distinction between the two different nuisance causes of action is discussed more fully in the text. See notes 53 through 58 and accompanying text *supra.*

Under the doctrine of prescriptive rights, a party whose actions constitute a private nuisance can claim the right to continue the action if no complaint is filed within the prescriptive period.[53] This defense, however, will not defeat a suit for an injunction if the acts involved constitute a public nuisance.[54]

The Mississippi Legislature has embellished these common law nuisance rules with several different sets of statutes.[55] The

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[53] *See* C. MARTZ, *supra* note 48, § 28.32, at 91. To obtain a prescriptive right to maintain the activity, the interference must have existed "openly, notoriously, under claim or rights, with the knowledge and acquiesence of those injured and as continuous as its nature permits for a period comparable to the statute of limitations for recovering possession of real property." *Id.* Once the prescriptive period has run, the activity becomes lawful from the time of the original action and a party loses any right to recover damages for injury to his property. *Id.*

Although only three Mississippi cases were found that directly applied the rules of prescriptive rights to nuisances, Mississippi appears to follow the general rules. *See* Cook Indus., Inc. v. Carlson, 334 F. Supp. 809, 818 (N.D. Miss. 1971) (prescriptive period equals adverse possession period of 10 years; nuisance must be substantially same in amount and effect throughout period); City of West Point v. Womack, 178 Miss. 808, 815, 174 So. 241, 242 (1937) (right obtained by prescription is limited to character and extent exercised during prescriptive period); Mississippi Mills Co. v. Smith, 69 Miss. 299, 306, 11 So. 26, 28 (1892) (injurious activity must not have increased during prescriptive period for party to be entitled to prescriptive right). In addition, cases decided under MISS. CODE ANN. § 15-1-13 (1972), the statute on adverse possession, specifically set out the same requirements as those on prescriptive rights. *Compare* McCaughn v. Young, 85 Miss. 277, 294, 37 So. 839, 842 (1905) (adverse possession must be hostile, actual, open, notorious, exclusive, and continuous) *with* Wills v. Reid, 86 Miss. 446, 451, 38 So. 793, 794 (1905) (adverse, open, and notorious possession required for the ripening of a prescriptive easement) *and* Alcorn v. Sadler, 71 Miss. 634, 640, 14 So. 444, 445 (1894) (10-year prescriptive period to gain easement). These comparisons are important in determining the status of Mississippi law since the general rule analogizes prescriptive rights to adverse possession. *See* C. MARTZ, *supra* note 48, § 28.32, at 91.

[54] *See* C. MARTZ, *supra* note 48, § 28.32, at 91. Most authorities take the position that as long as the nuisance is a public one, the doctrine of prescriptive rights is not available as a defense in a suit for special damages caused by the nuisance. *E.g.*, Smejkal v. Empire Lite-Rock, Inc., 547 P.2d 1363, 1365 (Or. 1976); RESTATEMENT (SECOND) OF TORTS § 821C, Comment *e* at 29-30, 35 (Tent. Draft. No. 16, 1970). This view fails to distinguish the difference between public and private nuisances and the respective remedies. The more logical view, which allows the defendant to claim the prescriptive rights defense against a private suit for damages caused by a public nuisance, has also been espoused. *See* Felton v. Wedthoff, 185 Mich. 72, 151 N.W. 727, 731 (1915) (although plaintiffs could obtain injunction to abate nuisance, the private claim for damages was defeated by the prescriptive period).

[55] *See, e.g.*, MISS. CODE ANN. § 41-43-1 (1972) (cemetery established near operational hospital is nuisance); *id.* § 61-7-5 (airport hazard is nuisance); *id.* §§ 95-3-1 to -27 (any place that regularly involves gambling, prostitution, or lewdness is nuisance). In actuality, these statutes do not change the common law rules. The only purpose of the statutes is to give the state legal grounds for enjoining the activity. However, the common law rules of

most recent of these statutes, the Mississippi Air and Water Pollution Control Act,[56] provides for the establishment of certain standards of air and water quality[57] and makes any violation of these standards a "public nuisance."[58] This statute also sets up an administrative board to enforce the standards[59] and allows any interested person to initiate the enforcement process by informing the board of an alleged violation.[60] Despite the court's implications in *Thornell*,[61] there is no provision in the act that either tolls the prescriptive period or allows an individual to bring suit to enforce the act.[62]

The plaintiffs' suits in *Thornell* were all private nuisance actions seeking compensation for damages caused by defendant's alleged air pollution.[63] Instructions based on the standards set by the Mississippi Air and Water Pollution Control Act were granted to the plaintiffs while the company's instructions on prescriptive rights were denied because of the trial court's conclusion that the act had tolled any prescriptive right.[64] The supreme court affirmed the finding.[65]

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nuisance also contemplate violation of a state statute as a public nuisance. *See generally* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999-1000 (1966).

[56] MISS. CODE ANN. §§ 49-17-1 to -43 (1972 & Supp. 1978).

[57] *Id.* § 49-17-19 (Supp. 1978).

[58] *Id.* § 49-17-29.

[59] *Id.* § 49-17-17.

[60] *Id.* § 49-17-31.

[61] 355 So. 2d at 301. The court explicitly found that the act had "tolled any prescriptive right gained by appellant or its predecessor in ownership." *Id.* The court in this sentence seems to equate the word "tolled" with the word "negated" since the opinion referred to rights that had already been "gained." *Id.* Generally speaking, however, the word "toll" means only that the running of the period cannot be used to bar an action. BLACKS LAW DICTIONARY 1658 (4th rev. ed. 1968). Therefore, any rights gained prior to the tolling of the statute are not taken away by the action that stops the running of the prescriptive period. *See* Leggett v. Norman, 192 Miss. 494, 500, 6 So. 2d 578, 580 (1942) (adverse possessor had no duty to inform original owner of rights already accrued).

The court's belief that a private cause of action exists under the act is implied by the court's affirmation of instructions granted to plaintiffs based on the act's definitions and standards. 355 So. 2d at 301.

[62] For a discussion of possible private causes of action arising out of environmental protection statutes, see 36 LA. L. REV. 1090 (1976). *See also* Wharton, *Judicially Enforceable Substantive Rights Under NEPA*, 10 U.S.F.L. REV. 415 (1976).

[63] 355 So. 2d at 300. Although the court does not specifically state that these were private nuisance actions, if the suits had been public nuisance actions for injunctions, they would have been brought in chancery court. These cases were brought in the circuit court of Warren County. *Id.*

[64] *Id.* at 301.

[65] *Id.*

The supreme court's affirmance on this point was not supported by citation.[66] Since there is no express provision in the act that negates the doctrine of prescription, the court must have based its holding upon the provision in the act that makes any violation of the air quality standards a "public nuisance."[67] The court probably reasoned that since the activity involved was a per se public nuisance, the doctrine of prescriptive rights was inapplicable. This reasoning, however, fails to recognize the all-important distinction[68] between a public and a private cause of action based on nuisance.

It cannot be denied that the problem of air pollution faced by the *Thornell* court is a pressing one, especially in a state with growing industry such as Mississippi. Nonetheless, the issue must be divided into both its private and public aspects[69] to ensure justice for the industrial landowners. An industrial landowner has a duty to both the public and to any adjoining property holder to reduce industrial emissions to a minimum. The duty that the corporation owes to the public has been established and will be enforced through the provisions of the Mississippi Air and Water Pollution Control Act. Since the duty is owed to the public as a whole,[70] no prescriptive right can be obtained.[71] The duty owed to

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[66] *Id.*

[67] MISS. CODE ANN. § 49-17-29 (Supp. 1978).

[68] See notes 56 through 61 and accompanying text *supra.*

[69] In the early 1900s, states divided nuisance into the different causes of action in determining the availability of the doctrine of prescription. *See* Hudson v. Dailey, 156 Cal. 617, 105 P. 748, 754 (1909) (private owner cannot avoid statute of limitations by claiming under public right instead of private right); Ireland v. Bowman, 130 Ky. 153, 113 S.W. 56, 58 (1908) (right to maintain dam may be acquired against private owner by prescription even where acts in question constitute a public nuisance as well as a private one); Felton v. Wedthoff, 185 Mich. 72, 151 N.W. 727, 731 (1915) (although plaintiffs could obtain injunction to abate nuisance, the private claim for damages was defeated by the running of the prescriptive period); Charnley v. Shawano Water Power & River Improvement Co., 109 Wis. 563, 85 N.W. 507, 509 (1901) (although operation of dam could be enjoined as public nuisance, private party whose land was injured by dam had no right to complain after running of prescriptive period); C. MARTZ, *supra* note 48, § 28.32, at 91 n.18. *Contra,* Smejkal v. Empire Lite-Rock, Inc., 547 P.2d 1363, 1365 (Or. 1976) (prescription does not defeat damage suit by private party who can show special damages from public nuisance).

[70] *See* City of Chicago v. Commonwealth Edison Co., 24 Ill. App. 3d 624, 321 N.E.2d 412, 418-19 (1974) (air pollution enjoinable by city as public nuisance); North Am. Coal Corp. v. Air Pollution Comm'n, 2 Pa. Commw. Ct. 469, 279 A.2d 356, 360 (1971) (air pollution as public nuisance).

[71] See note 63 *supra.*

the adjoining landowner, however, has not been specifically established. It is based not on statute, but on the common law rules of nuisance.[72] In addition, the burden of enforcing this duty is upon the adjoining landowner himself.[73] Prior to *Thornell,* failure to enforce this duty within a specified time resulted in a denial of the adjoining landowner's request for damages for injuries caused by an alleged nuisance.[74] Of course, since no prescriptive right can be asserted against the sovereign, even one who is barred from recovering damages can have the activity enjoined if it constitutes a public nuisance.[75] Therefore, under previously existing law, the duty owed by the industrial landowner to the public could be enforced without subjecting the corporation to stale claims for damages.[76] Now, however, a private party can delay his claim indefinitely without fear of losing his cause of action.

The most disturbing aspect of the *Thornell* opinion, however, is the fact that the court went out of its way to discuss the effect of the Mississippi Air and Water Pollution Control Act upon the doctrine of prescriptive rights. The court stated that the evidence failed to show that the continuous use requirement of prescription had been met.[77] This fact alone was a ground upon which the court could have based its denial of the requested instructions on prescriptive rights.[78] By holding that the legislature had abrogated the doctrine of prescription in air pollution cases, the su-

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[72] See notes 57 and 60 *supra.*

[73] See note 60 *supra.*

[74] See note 62 *supra.*

[75] See note 63 *supra.*

[76] *See* Felton v. Wedthoff, 185 Mich. 72, 151 N.W. 727, 731 (1915) (private claim for damages is defeated by the running of the prescriptive period even if activity is also a public nuisance); C. MARTZ, *supra* note 48, § 28.32, at 91.

[77] 355 So. 2d at 301.

[78] Continuous use in substantially the same character must be proven to entitle one to claim a prescriptive right. *See* Cook Indus., Inc. v. Carlson, 334 F. Supp. 809, 817-18 (N.D. Miss. 1971) (where character or amount of nuisance is constantly increasing no prescriptive right can be obtained); Curry v. Farmers Livestock Mkt., 343 S.W.2d 134, 138 (Ky. 1961) (doctrine of prescriptive right not available where harmful effect of nuisance greatly increased prior to running of prescriptive period); Schmidt v. Village of Mapleview, 293 Minn. 106, 196 N.W.2d 626, 628 (1972) (prescriptive period starts to run from the time when continuous use is changed in amount or character); City of West Point v. Womack, 178 Miss. 808, 816, 174 So. 241, 242 (1937) (where change in stream of river during prescriptive period increased pollution on plaintiff's property doctrine of prescription did not apply).

preme court has substantially limited an industrial landowner's right to enjoy his property.

C. *Banks' Liability for Employee Fraud*

First American National Bank v. Mitchell[79] presented an issue never before decided by the Mississippi Supreme Court—whether a bank may be liable for the fraudulent acts of its officers.[80] After making the first payment on a $69,000 loan secured by a second deed of trust on their farm, the Mitchells were informed by Reed, a vice-president of the bank, that the bank's loan limit had dropped and the loan would have to be paid down to $30,000. Attempts to refinance the loan were unsuccessful, and Reed told the Mitchells that if they did not sell the farm to pay off the loan, the bank would have to foreclose.[81] Reed arranged the sale of the farm to a "friend" who bought the property for $192,000. The same day, however, the "friend" deeded the farm to a third party for $220,000.[82] After discovering this sale, the Mitchells sued the bank for actual and punitive damages, claiming that they had been fraudulently induced to sell their property without being informed that a higher price was available.[83] The jury returned a verdict against the bank of $100,000 actual damages, and $250,000 punitive damages.[84] The supreme court affirmed the jury's finding of liability, but reversed and remanded on the issue of damages, stating that there was insufficient evidence to support either amount.[85]

The issue of a bank's liability for the fraudulent acts of its officers has not been frequently litigated. In those cases that have presented the question, the courts have been nearly unanimous in finding a bank responsible where an officer's misdeeds were committed while within the scope of his employment.[86] Since the

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[79] 359 So. 2d 1376 (Miss. 1978).

[80] The Mississippi Supreme Court had previously decided at least one case concerning a bank's liability for the wrongful acts of its employees. Grenada Bank v. Moore, 131 Miss. 339, 342, 95 So. 449, 450 (1923) (bank must return bonds wrongfully obtained by manager from customer's account).

[81] 359 So. 2d at 1377-78.

[82] *Id.*

[83] *Id.* at 1377.

[84] *Id.*

[85] *Id.* at 1377, 1381.

[86] *See* Standard Sur. & Cas. Co. v. Plantsville Nat'l Bank, 158 F.2d 422, 424 (2d Cir.

mere presence of fraudulent intent arguably removes an employee's actions from the scope of his employment,[87] however, the courts have had to formulate a test for determining the point at which a fraudulent employee's actions exceed the bounds of his employment.

The test is based upon a comparison of the officer's interest in acting and the bank's interest in the result of the act.[88] Many courts,[89] including the Mississippi Supreme Court,[90] recognize that an officer's individual interest will often be independent of

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1946) (bank liable for misrepresentations made by cashier while in scope of employment), *cert. denied*, 331 U.S. 812 (1947); Gartner v. American Nat'l Bank, 58 So. 2d 705, 706 (Fla. 1952) (en banc) (recognizing general rule that bank may be liable for fraudulent misrepresentations of employee made within scope of his employment); A.S.C. Corp. v. First Nat'l Bank, 161 N.E.2d 179, 188 (Ind. App. 1959) (bank is chargeable with fraudulent acts of its officers committed while conducting business delegated to them); Nevada Nat'l Bank v. Gold Star Meat Co., 89 Nev. 427, 514 P.2d 651, 654 (1973) (officer's misrepresentation of facts within his knowledge subjects the bank to liability for injuries caused); *cf.* Pugh v. First Nat'l Bank, 130 Ga. App. 627, 204 S.E.2d 370, 371 (1974) (plaintiff not entitled to recover from bank for slanderous statements by president unless statements were authorized by bank).

[87] The rationale underlying this notion is based upon a general reluctance of the courts to hold the master liable for injuries caused by the servant's intentional acts over which the master has no control. *See* State v. Superior Court, 111 Ariz. 130, 524 P.2d 951, 953 (1974) (en banc) (master liable for acts that he controls or has right to control); Maxine Gerard, Inc., v. William B. May & Co., 51 Misc. 2d 711, 273 N.Y.S.2d 888, 890 (Sup. Ct. 1966) (slander is intentional tort and therefore not within scope of employment); Adami v. Dobie, 440 S.W.2d 330, 334 (Tex. Civ. App. 1969) ("[a] master is not liable for unauthorized intended tortious conduct of his servant, even when the act was done in connection with the servant's employment, where the wrongful act was unexpectable, in view of the duties of the servant").

[88] *See* City Nat'l Bank v. McCann, 193 Ark. 967, 986, 106 S.W.2d 195, 205 (1937) (knowledge of bank president imputed to bank, despite president's fraudulent intent, because interest of president was not adverse to bank's interest).

Although the question of whether a servant's knowledge should be imputed to the master may seem irrelevant on the issue of whether the servant's acts were within the scope of his employment, the court in *Mitchell* suggested that the same factors govern both issues. After citing *McCann* and just before discussing whether Reed's knowledge should be imputed to the bank, the court stated that the bank's argument "on leaving a master's business [is] not applicable because at all times in the instant case Reed appears to the Mitchells to be looking out for the bank's interest." 359 So. 2d at 1380.

[89] *See* Hooker v. New Amsterdam Cas. Co., 33 F. Supp. 672, 674 (W.D. Ky. 1940) (where bank benefits from transaction, knowledge of fraudulent officer is imputed to bank); City Nat'l Bank v. McCann, 193 Ark. 967, 986, 106 S.W.2d 195, 205 (1937) (mere fact that officer's interest is independent of bank's interest will not shield bank from liability); 9 C.J.S. *Banks and Banking* § 202 n.17 (1938) (same).

[90] First Am. Nat'l Bank v. Mitchell, 359 So. 2d 1379-80 (Miss. 1978) (recognizing that independent interests are not necessarily adverse).

the bank's interest. The officer's action will be held to be outside the scope of his employment, however, only if his interest in acting is directly adverse to the bank's interest.[91] Otherwise the bank will be held responsible for any damages caused by the officer's fraudulent acts.

In the instant case, the Mississippi Supreme Court concluded that Reed's interest in having the property sold was not adverse to the bank's interest since the bank benefited by receiving payment of an unfavorable loan.[92] Therefore, the court reasoned, the bank must fulfill its fiduciary duties to its mortgagor despite the fraud of its agent. The bank's failure to inform the mortgagor of the higher price, of which it had knowledge through officer Reed, was a breach of this duty for which the bank was held liable.[93]

The theory of liability upon which the court based its opinion is not clear. Although the court's holding implies that liability was based upon the doctrine of respondeat superior,[94] the opinion closes with an express finding that the bank itself breached a duty

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[91] Federal Deposit Ins. Corp. v. Lott, 460 F.2d 82, 88 (5th Cir. 1972) (knowledge of one acting fraudulently is not imputable to bank because of its adverse interest); Miskimins v. City Nat'l Bank, 248 Ark. 1194, 456 S.W.2d 673, 679 (1970) (bank cannot be charged with knowledge of officer with adverse interest); *cf.* Mechanicsville Trust & Sav. Bank v. Hawkeye-Security Ins. Co., 158 N.W.2d 89, 92 (Iowa 1968) (there is a clear presumption that fraudulent officer will not reveal his intent to bank). *But cf.* Mid-Continent Nat'l Bank v. Bank of Independence, 523 S.W.2d 569, 574 (Mo. Ct. App. 1975) (knowledge of assistant cashier regarding fraudulent procurement of cashier's check was knowledge of bank for purposes of determining whether bank was a holder in due course); Commercial State Bank v. Algeo, 331 S.W.2d 84, 86 (Tex. Civ. App. 1959) (where trustee withdrew funds from trust account for own personal use, bank deemed to have actual knowledge of breach of trust).

It should also be noted that some jurisdictions have adopted what is known as the "sole actor" doctrine. Under this rule the knowledge of an officer with an interest adverse to the bank's interest is still imputed to the bank were the officer is the sole representative of the bank. City Nat'l Bank v. Vanderboom, 422 F.2d 221, 231 (8th Cir. 1970); Jacobsen v. Federal Deposit Ins. Corp., 407 F. Supp. 821, 826 (S.D. Iowa 1976).

[92] 359 So. 2d at 1380.

[93] *Id.*

[94] In its holding the court stated:

> We hold here upon the facts presented that a bank is liable for the fraudulent acts of its officer or agent who, acting within the apparent scope of his authority, induces a debtor (mortgagor) of the bank to enter into a transaction with a third person, or with the officer or agent personally, whereby the debtor is defrauded and damaged.

Id. at 1379.

it owed to the Mitchells.[95] The distinction between the two theories of liability is not important, however, because the plaintiff must show under either theory that the defrauding party was acting within the scope of his employment.[96] Without this proof the plaintiff would be unable to make the prima facie case necessary to take the issue of the bank's liability to the jury.[97]

Rejecting the bank's claim that Reed had stepped outside the scope of his duties, the court emphasized the fact that the interests of Reed and the bank were not adverse.[98] In defining the interests of these parties, however, the court failed to recognize that the bank's interest was not simply in reducing an unfavorable loan, but in reducing an unfavorable loan through the sale of the mortgagor's property at the highest possible price. Since Reed's interest in the sale required that the Mitchells not be told of the higher price, Reed's interest could be viewed as directly adverse to the bank's interest. Therefore, under the court's own formula, Reed's actions could have been held to have been outside the scope of his employment.[99]

The court has obviously rendered the decision it feels is most equitable to the Mitchells. What is equitable to one party, however, may be inequitable to the opposing side. The bank's liability in this case stems from a failure to control its employee. Because of this misdeed the bank has been ordered to pay not only

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[95] *Id.* at 1380.

[96] *Compare* Sparks v. Buffalo Cab Co., 113 Ga. App. 528, 148 S.E.2d 919, 920 (1966) (master is liable only under the doctrine of respondeat superior for those torts committed by servant while engaged in master's business) *and* LeBrane v. Lewis, 292 So. 2d 216, 217-18 (La. 1974) (same) *and* Odier v. Sumrall, 353 So. 2d 1370, 1372 (Miss. 1978) (en banc) (same) *with* Gartner v. American Nat'l Bank, 58 So. 2d 705, 706 (Fla. 1952) (en banc) (bank is liable for fraudulent misrepresentations made by employee while within scope of his employment) *and* A.S.C. Corp. v. First Nat'l Bank, 161 N.E.2d 179, 188 (Ind. App. 1959) (bank is liable for injuries caused by fraudulent acts of officers committed within scope of employment).

[97] *See* Prairie Livestock Co. v. Chandler, 325 So. 2d 908, 911 (Miss. 1976) (en banc) (no jury question where evidence failed to show that employee who caused injury was within scope of his employment); Martin v. Jenkins, 381 S.W.2d 115, 122 (Tex. Civ. App. 1964) (defendant's summary judgment motion affirmed where evidence showed that tortfeasor was outside scope of employment at time of accident); Bituminous Cas. Corp. v. United Military Supply, Inc., 69 Wis. 2d 426, 230 N.W.2d 764, 769 (1975) (jury verdict reversed and complaint dismissed where evidence failed to establish that employee was within scope of his employment).

[98] 359 So. 2d at 1379-80.

[99] See note 108 *infra*.

actual damages but punitive damages as well.[100] Although the award is consistent with the current views on punitive damages,[101] the propriety of awarding this type of damages in a case such as *Mitchell* should be reconsidered.

In Mississippi,[102] as well as in other jurisdictions,[103] damages have traditionally been awarded for the sole purpose of placing the injured party in as good a position as he was prior to the injury. Damages are generally not to be awarded in an amount that will allow the injured party to profit from litigation.[104] In

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[100] 359 So. 2d at 1381. Although the court did state that the award of $250,000 in punitive damages was excessive, the holding was based on lack of evidence of defendant's worth. *Id.* Therefore, if the plaintiff produces the proper evidence on remand, a similar award may be made and subsequently upheld.

[101] Currently, punitive damages may be awarded against a master for the willful, wanton, or fraudulent acts of its servant committed within the scope of his employment. *See* Tietjens v. General Motors Corp., 418 S.W.2d 75, 88 (Mo. 1967) (affirming jury award of punitive damages against corporation for fraudulent acts of one of corporation's zone managers); Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761, 767 (1968) (punitive damages may be awarded against a corporate employer for assault occurring within course of employment); Stroud v. Denny's Restaurant, Inc., 271 Or. 430, 532 P.2d 790, 793 (1975) (en banc) (corporation is liable for punitive damages if employee's act would be sufficient to render him liable for punitive damages). Although most jurisdictions require the master's ratification of the act for an award of exemplary damages against him, some jurisdictions do not. *Compare* Kuchta v. Allied Builders Corp., 21 Cal. App. 3d 541, 549, 98 Cal. Rptr. 588, 592 (1971) (punitive damages against corporation may be awarded where corporation authorized or ratified employee's fraudulent act) *and* Couillard v. Bank of New Mexico, 89 N.M. 179, 548 P.2d 459, 461-64 (Ct. App. 1976) (trial court's directed verdict for bank on question of punitive damages affirmed because bank neither authorized nor ratified officer's fraudulent act) *and* Addair v. Huffman, 156 W. Va. 592, 195 S.E.2d 739, 745 (1973) (master who knowingly employs careless servant impliedly authorizes his acts and can be held liable for punitive damages) *with* Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 479 S.W.2d 518, 523 (1972) (fact that employer did not authorize employee to turn back mileage reading on odometer does not shield employer from punitive damages) *and* Osborn v. Gene Teague Chevrolet Co., 254 Or. 486, 459 P.2d 988, 990 (1969) (en banc) (lack of express authorization will not preclude award of punitive damages against company whose employee turned back mileage on odometer). Mississippi appears to follow the minority rule. *See* Sandifer Oil Co. v. Dew, 220 Miss. 609, 630, 71 So. 2d 752, 758 (1954) (holding that the principle of allowing punitive damages against a master is so embedded in Mississippi law that no citation is necessary); D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 221, 16 So. 2d 770, 773 (1944) (en banc) (rejecting majority requirement that employer must ratify acts of employee to be subject to punitive damages).

[102] *E.g.*, Lee v. Southern Home Sites Corp., 429 F.2d 290, 293 (5th Cir. 1970); McDaniel Bros. Constr. Co. v. Jordy, 195 So. 2d 922, 924 (Miss. 1967).

[103] *E.g.*, Adams v. Deur, 173 N.W.2d 100, 105 (Iowa 1969); DeSpirito v. Bristol County Water Co., 102 R.I. 50, 227 A.2d 782, 784 (1967); DeNike v. Mowery, 69 Wash. 2d 357, 418 P.2d 1010, 1012 (1966).

[104] *E.g.*, Luth v. Rogers & Babler Constr. Co., 507 P.2d 761, 766 (Alaska 1973); Mississippi Power Co. v. Harrison, 247 Miss. 400, 424, 152 So. 2d 892, 903 (1963); Spackman v.

certain situations, however, punitive damages may be awarded as punishment for a defendant's misdeeds,[105] and the award of such damages almost assures that the plaintiff will be in a better position after the injury than he was prior to it.[106]

Additionally, the purpose of punitive damages, punishment for the defendant's misconduct,[107] is not fulfilled in cases such as *Mitchell.* In the typical vicarious liability situation, the master is liable not because of its own misdeed but because of the injuries caused by its agent's misdeeds.[108] Therefore, any award of punitive damages fails to achieve its purpose, while providing a windfall[109] to the plaintiff. Nonetheless, courts continue to award punitive damages against employers for the acts of employees,[110] as did the court in the instant case.[111]

Despite the fact that the *Mitchell* holding is in line with the general rule on punitive damages, alternative approaches should be considered in situations where the defendant is held liable for

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Ralph M. Parsons Co., 147 Mont. 500, 414 P.2d 918, 921 (1966); Incollingo v. Ewing, 444 Pa. 263, 299, 282 A.2d 206, 228 (1971).

[105] Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977); Merlo v. Standard Life & Accident Ins. Co., 59 Cal. App. 3d 5, 20, 130 Cal. Rptr. 416, 426 (1976). Some state courts, however, do not allow punitive damages in the absence of statutory authorization. *See, e.g.,* Fassitt v. United T.V. Rental, Inc., 297 So. 2d 283, 287 (La. Ct. App. 1974) (punitive damages not awardable in Louisiana); Maki v. Aluminum Bldg. Products, 73 Wash. 2d 23, 436 P.2d 186, 187 (1968) (doctrine of punitive damages not recognized in Washington).

[106] *See* Merlo v. Standard Life & Accident Ins. Co., 59 Cal. App. 3d 5, 20, 130 Cal. Rptr. 416, 426 (1976) (although punitive damages may result in double recovery, it is a permissible double recovery). Most courts recognize this possibility and merely except punitive damages from the general rule on recovery of damages. See note 123 *infra.* Mississippi has handled this problem by finding that the basis for the award to the plaintiff is "that of rewarding an individual for public service in bringing the wrongdoer to account." Snowden v. Osborne, 269 So. 2d 858, 860 (Miss. 1972).

[107] See note 124 *infra.*

[108] *See* Maxey v. Citizens Nat'l Bank, 489 S.W.2d 697, 704 (Tex. Civ. App. 1972) (liability of bank for misdeeds of its officers is derivative and not primary), *rev'd on other grounds,* 507 S.W.2d 722 (Tex. 1974). *But see* Capital Transp. Co. v. McDuff, 319 So. 2d 658, 660-61 (Miss. 1975) (case will not be reversed on appeal simply because master is held liable where verdict fails to provide for servant's liability); D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11, 12 (Miss. 1971) (master held liable even though servant expressly exonerated from liability).

[109] The fact that an award of punitive damages constitutes a windfall can be seen from a comparison of income tax cases concerning damages. *Compare* McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 39 (2d Cir. 1960) (compensatory damages for personal injuries are not taxable as income) *with* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431-33 (1955) (punitive damages are taxable as ordinary income).

[110] See note 120 *infra.*

[111] 359 So. 2d at 1381.

the acts of its servant. For example, instead of awarding punitive damages, the court could have awarded attorneys' fees to the plaintiff. In this way the plaintiff would be made completely whole[112] without obtaining any profit. Another possible solution is that the legislature could provide that any award of punitive damages is collectible by the state treasury for its general fund. The defendant would thus be punished while the state rather than the individual plaintiff would reap the benefits. A final option is that the Mississippi courts could follow the current majority rule[113] allowing an award of punitive damages against the master only where he has concurred in, consented to, or authorized the servant's misdeeds.

The rule this state currently follows has been responsible for the award of punitive damages against corporate defendants who did little more than hire the person who actually caused the injuries.[114] Although any change in the general rules will probably face strong opposition, these changes should be considered in an effort to protect the rights of both parties without allowing the plaintiff to gain an undeserved profit.

II. Legislative Enactments

Although the field of torts is not conducive to legislation, the

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[112] Although the purpose of compensatory damages is to make the plaintiff whole, many plaintiffs come out of litigation with much less than the jury awarded them because of the growing use of the contingency fee arrangement. *See generally* Note, *Attorney's Fees as an Element of Costs: The Copyright Experience,* 4 Ga. L. Rev. 571 (1970); Comment, *Attorney's Fees,* 43 Miss. L.J. 238 (1972); 21 Clev. St. L. Rev. (2) 15 (1972).

If the court refuses to take the initiative, the legislature could force the issue by requiring that attorneys' fees be awarded in lieu of punitive damages against an employer. This type enactment would not be novel in Mississippi since there are currently several statutes authorizing the granting of attorneys' fees. *See* Miss. Code Ann. § 9-5-89 (1972) (compensation of guardian ad litem); *id.* § 11-5-167 (compensation of receiver); *id.* § 91-7-281 (attorneys' fees of administrator of estate allowable).

[113] See note 120 *infra.*

Even if the court in the *Mitchell* case had adopted the majority rule, there is no guarantee that the result would have been changed. It is quite possible that the statement made by the bank's president to the Mitchells that Reed "knew what he was doing" would have been enough of a concurrence or ratification to justify imposing liability on the bank. 359 So. 2d at 1378.

[114] *See* Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 479 S.W.2d 518, 523 (1972) (punitive damages awarded against company whose employee fraudulently turned back mileage on odometer of used car to increase price); Osborn v. Gene Teague Chevrolet Co., 254 Or. 486, 459 P.2d 988, 990 (1969) (en banc) (same).

Mississippi Legislature found the need during the 1978 session to pass two bills concerning tortious activity. The first of these bills simply closes a jurisdictional gap in the Mississippi code by amending the nonresident motorist statutes. The amendment will give Mississippi courts jurisdiction over a nonresident who was a resident at the time the cause of action accrued but who became a nonresident prior to commencement of the action.[115]

The second bill,[116] however, is more substantive. In this bill the legislature has given a criminal court the power to order a person[117] convicted of a criminal offense to pay pecuniary damages to any person who suffered special damages due to the defendant's criminal activities.[118] This restitution order is to be included as part of the sentence[119] and, as such, can be enforced by the court through imprisonment of the defendant.[120]

Although a bill that combines the determination of civil and criminal liabilities in a single proceeding appears to present problems, the legislature seems to have covered most of the pitfalls. Most importantly, the bill states that it in no way impairs the right of the injured party to sue the defendant for damages in a civil suit.[121] This saving clause protects the injured party's rights, especially in view of the fact that the criminal court is empowered to award special damages only,[122] and may not consider general damages. The legislature also had the foresight to make the restitution order enforceable by the injured party through "any means authorized by law for the enforcement of a judgment."[123] An injured party who has no desire to claim general damages can there-

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[115] H.R. 1195, 1978 Miss. Leg., Reg. Sess., *enacted as* Chapter 378, 1978 Miss. Laws, *codified at* MISS. CODE ANN. §§ 13-3-57, -63 (Supp. 1978). The bill was approved on March 15, 1978, and went into effect on July 1, 1978.

[116] H.R. 512, 1978 Miss. Leg., Reg. Sess., *enacted as* Chapter 400, 1978 Miss. Laws, *codified at* MISS. CODE ANN. §§ 99-37-1 to -21 (Supp. 1978). The bill was approved on March 23, 1978, and became effective on July 1, 1978. Since the legislature failed to entitle the act, in this paper these statutes will be referred to as the Mississippi Crime Victim Restitution Act. *Id.*

[117] This statute also applies to corporations and unincorporated associations. MISS. CODE ANN. § 99-37-7(3) (Supp. 1978).

[118] *Id.* § 99-37-3(1).

[119] *Id.*

[120] *Id.* § 99-37-7(2).

[121] *Id.* § 99-37-17(1).

[122] *Id.* §§ 99-37-1(b), -3(1).

[123] *Id.* § 99-37-13.

fore be made whole without having to go to court.

Of course this bill protects the rights of the defendant as well as those of the injured party. The order of restitution is not automatic, but is made within the court's discretion based on factors such as the defendant's current financial status, other obligations, and the rehabilitative effect of restitution upon the defendant.[124] In addition, if the defendant is sentenced to a term of imprisonment, the order of restitution is not enforceable during his imprisonment unless the court expressly finds that he has the assets to pay the amount ordered.[125] The defendant also has the right to be heard if he objects to the order or amount of restitution.[126] Finally, the court's order of restitution may be reduced or revoked if the defendant can show reasons for his default in payment.[127]

The use of damage plans for crime victims has been widely suggested in the United States for the past fifteen years.[128] Although several attempts to set up a federally-sponsored plan have failed,[129] many state legislatures have passed some form of victim compensation statute.[130] These plans are generally divided into two types:[131] (1) a victim compensation fund,[132] or (2) court or-

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[124] *Id.* § 99-37-3.

[125] *Id.* § 99-37-5(1).

[126] *Id.* § 99-37-3(3).

[127] *Id.* § 99-37-11.

[128] *See generally* Haas, *An Argument for the Enactment of Criminal Victim Compensation Legislation in Oregon,* 10 WILLAMETTE L.J. 185 (1974); Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness,* 5 U. RICH. L. REV. 71 (1970); Symposium, *Compensation to Victims of Crimes of Personal Violence: An Examination of the Scope of the Problem,* 50 MINN. L. REV. 211 (1966); 19 VAND. L. REV. 220 (1965).

[129] *See generally* Yarbrough, *S. 2155 of the Eighty-Ninth Congress—The Criminal Injuries Compensation Act,* 50 MINN. L. REV. 255 (1966); Yarbrough, *The Battle for a Federal Violent Crimes Compensation Act: The Genesis of S. 9,* 43 U.S. CAL. L. REV. 93 (1970).

The closest Congress came to enacting compensation legislation was in 1973 when the Senate passed the Victims of Crime Act of 1973, S. REP. No. 300, 93rd Cong., 1st Sess., 119 Cong. Rec. 10335-38 (1973). Both companion bills died in committee in the House of Representatives. H.R. REP. No. 7384, 93rd Cong., 1st Sess., 119 Cong. Rec. 13860 (1973); H.R. REP. No. 8777, 93rd Cong., 1st Sess., 119 Cong. Rec. 20140 (1973).

[130] At the present time 31 states and the Virgin Islands have enacted some form of victim compensation or restitution plan. For a complete list of those statutes, broken down by type of statute, see notes 157 & 158 *infra.*

[131] Laster, *supra* note 128, at 80. The basis of this distinction is the source of the payment. Under a compensation plan, the state pays the victim, while under a restitution

dered restitution by the defendant.[133] Under the compensation fund plan, the victim must apply either to a compensation board[134] or to a specific court[135] for payment. If the ruling on the application is favorable the victim is paid by the state from the fund.[136] The representative of the fund is then subrogated to the rights of the victim against the defendant up to the amount of compensation.[137] The court-ordered restitution plan, however, dispenses with any state involvement other than the court order itself.[138] The order is usually part of the sentence and subjects the

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plan the defendant is directly liable to the victim. *Id.* Although some authors have attempted to divide the plans into more than two categories, this division is based upon the administration of the plan instead of on the more important factor of the source of the payment. *See* Lamborn, *The Methods of Governmental Compensation of Victims of Crime,* 1971 U. ILL. L.F. 655, 657-67; McAdam, *Emerging Issue: An Analysis of Victim Compensation in America,* 8 URB. LAW. 346, 353-54 (1976).

[132] The following victim compensation fund statutes have been enacted in the United States: ALASKA STAT. §§ 18.67.010 to .180 (1974); CAL. GOV'T CODE §§ 13959-13969.1 (West Supp. 1978); DEL. CODE ANN. tit. 11, §§ 9001-9017 (Supp. 1978); GA. CODE ANN. §§ 47-518 to -526 (1974); HAW. REV. STAT. §§ 351-1 to -70 (1976); ILL. ANN. STAT. ch. 70, §§ 71-84 (Smith-Hurd Supp. 1978); KY. REV. STAT. ANN. §§ 346.010 to .165 (Baldwin Supp. 1978); MD. ANN. CODE art. 26A, §§ 1-17 (1973 and Supp. 1978); MASS. GEN. LAWS ANN. ch. 258A, §§ 1-8 (West Supp. 1978); MICH. COMP. LAWS ANN. §§ 18.351 to .368 (Supp. 1978); MINN. STAT. ANN. §§ 299B.01 to .16 (West Supp. 1978); NEV. REV. STAT. §§ 217.010 to .270 (1977); N.J. STAT. ANN. §§ 52:4B-1 to -21 (West Supp. 1978); N.Y. EXEC. LAW §§ 620-635 (McKinney 1972); N.D. CENT. CODE §§ 65-13-01 to -20 (Supp. 1978); OHIO REV. CODE ANN. §§ 2743.51 to .72 (Page Supp. 1977); PA. STAT. ANN. tit. 71, §§ 180-7 to -7, -16 (Purdon Supp. 1978); R.I. GEN. LAWS §§ 12-25-1 to -12 (Supp. 1977); TENN. CODE ANN. §§ 23-3501 to -3517 (Supp. 1976); V.I. CODE ANN. tit. 34, §§ 151-177 (Supp. 1977); VA. CODE §§ 19.2-368.1 to -368.18 (Supp. 1978); WASH. REV. CODE ANN. §§ 7.68.010 to .165 (Supp. 1978); WIS. STAT. ANN. §§ 949.01 to .18 (West Supp. 1978).

[133] The following states have enacted restitution statutes: FLA. STAT. ANN. § 775.089 (West Supp. 1978); HAW. REV. STAT. §§ 706-602, -605 (1976); IOWA CODE ANN. § 712 (West Supp. 1977); KAN. STAT. § 62-2241(h) (1964); ME. REV. STAT. tit. 17-A, §§ 1321-1328 (Supp. 1978); MISS. CODE ANN. §§ 99-37-1 to -21 (Supp. 1978); NEB. REV. STAT. §§ 28-506, -512 (1975); OKLA. STAT. ANN. tit. 22, § 991 (West Supp. 1978); OR. REV. STAT. §§ 137.103 to .109 (1977); S.D. COMPILED LAWS ANN. §§ 23-48A-1 to -6 (Supp. 1978); S.D. COMPILED LAWS ANN. §§ 23A-28-1 to -10 (Supp. 1978).

[134] *E.g.,* HAW. REV. STAT. § 351-13 (1976); MINN. STAT. ANN. § 299B.07 (West Supp. 1978); VA. CODE § 19.2-368.5 (Supp. 1978).

[135] *E.g.,* OHIO REV. CODE ANN. § 2743.53 (Page Supp. 1977); R.I. GEN. LAWS § 12-25-3 (Supp. 1977); TENN. CODE ANN. § 23-3503 (Supp. 1976).

[136] *E.g.,* DEL. CODE ANN. tit. 11, § 9005 (Supp. 1978); VA. CODE § 19.2-368.18 (Supp. 1978).

[137] *E.g.,* HAW. REV. STAT. § 351-35 (1976); OHIO REV. CODE ANN. § 2743.72 (Page Supp. 1977); WIS. STAT. ANN. § 949.15 (West Supp. 1978).

[138] *See, e.g.,* FLA. STAT. ANN. § 775.089 (West Supp. 1978); NEB. REV. STAT. § 28-506 (1975); OKLA. STAT. ANN. tit. 22, § 991 (West Supp. 1978).

defendant to imprisonment for contempt if he fails to pay.[139] Although the chances of ultimate recovery are better under the compensation fund plan,[140] both systems offer criminal victims hope for recovery without undue expense.

Despite the fact that the compensation fund is currently the more popular of the two plans,[141] the Mississippi Legislature chose the court-ordered restitution plan.[142] The Mississippi version of restitution should provide relief to crime victims in situations where previously no relief was available. Prior to the enactment of House Bill 512, a person with a small claim against a criminal defendant was forced simply to accept the loss because of the high cost of pursuing his claim, especially where the probable result was a judgment against a nearly insolvent defendant. Under this statute, however, the injured party may obtain the same "judgment"[143] without the cost of legal fees.

Of course, the statute is not without problems. One of the most obvious problems is that the bill fails to mention the means by which information concerning the amount of damages is presented to the court. Except in situations where the offense depends upon the value of an object,[144] any evidence of damages would be irrelevant and prejudicial in a criminal case.[145] Even assuming that the relevancy problem is resolved, there is no provision in the statute that would allow the injured party or his counsel to establish the damages he suffered.[146] This noticeable omission implies that it is the prosecuting attorney's duty to

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[139] *See* ME. REV. STAT. tit. 17-A, § 1323 (Supp. 1978); MISS. CODE ANN. § 99-37-7 (Supp. 1978).

[140] Chances for recovery are better under the compensation plan since the state is likely to be more solvent than the criminal defendant. *See* Brooks, *The Case for Creating Compensation Programs to Aid Victims of Violent Crimes,* 11 TULSA L.J. 477, 480-81 (1976); 8 WM. & MARY L. REV. 277, 284 (1966).

[141] Currently, 23 states have state-funded compensation plans while ten states have court-ordered restitution. See notes 157 & 158 *infra.* Hawaii has both plans. HAW. REV. STAT. §§ 351-1 to -70, 706-602 (1976).

[142] See note 138 *supra.*

[143] Although the Mississippi Crime Victim Restitution Act does not make the restitution order a judgment, it does allow a victim to enforce the order as if it were a judgment. MISS. CODE ANN. § 99-37-13 (Supp. 1978).

[144] *See id.* § 97-17-41 (grand larceny).

[145] *See generally* Brand & Palmer, *Relevancy and Its Limits,* 48 MISS. L.J. 935 (1977).

[146] The French system of restitution avoids this problem by allowing the victim to join in the criminal proceedings as a "civil party." For a general discussion of this aspect of the French system, see 26 ME. L. REV. 125, 138-47 (1974).

bring this issue before the court. Such a mixing of criminal and civil issues could cause both evidentiary[147] and ethical[148] problems. Another potential problem with the bill is that any award of restitution lies wholly within the trial court's discretion.[149] Thus a criminal court could refuse to hear evidence concerning the victim's injury, denying the victim's statutory right of restitution.

The most significant problem created by the statute stems from the bill's extremely broad definition of the term "criminal activities." Since the restitution order could be entered in "any offense . . . of which the defendant is convicted"[150] and since the statute fails to limit the term "court," the bill arguably grants lower level courts such as the justice and county courts the power to order restitution.[151] This apparent oversight could convert cases involving minor criminal charges into large damages cases,[152] especially if the injured party is satisfied with obtaining only spe-

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[147] See note 170 *infra*.

[148] Although there appears to be no canon or disciplinary rule in the Mississippi Code of Professional Responsibility expressly prohibiting a prosecuting attorney's advancing the claims of the victim at the criminal trial, the bans on solicitation and on conflict of interest could apply, especially in view of Canon 9, which requires attorneys to avoid even the appearance of professional impropriety. *See* MISSISSIPPI CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULES 2-103, 5-101, and 9-101. It is also arguable that Disciplinary Rule 9-101(B) may prohibit the prosecuting attorney's involvement in the victim's claim since it states that an attorney cannot take part in the disposition of a private matter if he had responsibility over the issue while he was a public employee. *Id.* DISCIPLINARY RULE 9-101(B). Finally, one of the ethical considerations under Canon 7 suggests that the use of "the criminal process to coerce adjustment of private civil claims . . . is a subversion of the [criminal] process" which diminishes the competence of the legal system to adjudicate controversies fairly. *Id.* Ethical Consideration 7-21.

[149] *See* MISS. CODE ANN. § 99-37-3(1) (Supp. 1978) ("the court *may* order . . . restitution") (emphasis added).

[150] *Id.* § 99-37-1(a).

[151] The justice court has criminal jurisdiction concurrent with the circuit court over all crimes where the maximum punishment is a fine and imprisonment in the county jail. MISS. CONST. art. 6, § 171. The county court has similar criminal jurisdiction. MISS. CODE ANN. § 9-9-21 (Supp. 1978). It could be argued by defense counsel, however, that since the jurisdiction of the county and justice courts over criminal matters extends only to offenses with maximum punishment of a fine and imprisonment in county jail, any award of restitution takes away the jurisdiction of the court because the punishment given is greater than the maximum amount allowable.

[152] This could be especially true in situations where the driver who allegedly caused an accident was given a ticket by the investigating officer. If the driver is convicted of that offense, the municipal judge could award special damages to one injured by the driver's conduct. *See id.* §§ 99-37-1 to -3.

cial damages. Moreover, since an order of restitution conclusively decides the issue of the defendant's liability in a subsequent civil suit,[153] an injured party could request restitution in a municipal or justice court proceeding and, if he receives it, could then concentrate solely on the issue of damages in a later civil suit.

Despite these practical problems, the Mississippi Legislature should be congratulated for attempting to remedy what was an unfair situation. For too many years, victims of crime have also been victims of a legal system that offered them little hope of compensation. The legislature has now established a means by which a victim may recover from the guilty party without the costs and difficulties of a civil trial. One would hope that the criminal courts will utilize this act to enforce a criminal victim's right to recover.

Whitman B. Johnson, III

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[153] *Id.* § 99-37-17(2). This is a departure from the general rule that a jury conviction in a criminal case is inadmissible in a subsequent civil suit. However, a plea of guilty in a criminal case has always been admissible in Mississippi in a subsequent civil case. *See* Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (plea of guilty to traffic charge admissible in subsequent civil suit); Kelly v. King, 196 So. 2d 525, 527 (Miss. 1967) (plea of guilty to murder charge admissible in subsequent wrongful death suit).

MISCELLANEOUS

I. Implied Warranty of Habitability

Until recently, Mississippi had lagged behind the national trend toward partial abrogation of the doctrine of caveat emptor through imposition of an implied warranty of habitability upon the builder-vendor of a new house.[1] In *Brown v. Elton Chalk, Inc.*,[2] the Mississippi Supreme Court quoted Justice Inzer's 1974 concurring opinion in *Oliver v. City Builders, Inc.*[3] and held that, by operation of law, a builder-vendor of a new house makes "an implied warranty that the home was built in a workmanlike manner and that it is suitable for habitation."[4] Although the Mississippi Supreme Court had held fifty years earlier in *Mincy v. Crisler*[5] that a builder-vendor of a new house was liable to his vendee for latent defects,[6] the court had consistently construed the doctrine of caveat emptor strictly in transactions involving real property.[7]

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[1] "Let the buyer beware (or take care) . . . . This maxim summarizes the rule that a purchaser must examine, judge, and test for himself, . . . the purchaser takes note of quality and condition unless he protects himself by a warranty or there has been a false representation. . . ." Blacks Law Dictionary 281 (rev. 4th ed. 1968).

[2] 358 So. 2d 721 (Miss. 1978).

[3] 303 So. 2d 466 (Miss. 1974).

[4] 358 So. 2d at 722 (quoting 303 So. 2d at 470 (Inzer, J. concurring)).

[5] 132 Miss. 223, 96 So. 162 (1923).

[6] *Id.* at 237-38, 96 So. at 163. In *Mincy*, a vendor purchased a vacant lot and erected a house upon it. *Id.* at 235, 96 So. at 162. The vendor had constructed the house upon a ditch over which he had placed lumber. *Id.* at 236, 96 So. at 162. Although the ditch was visible to any observer, the fact that the ditch ran under the house was not apparent. *Id.*, 96 So. at 162-63. Upon the purchaser's examination of the premises, no disclosure of this fact was made. *Id.*, 96 So. at 163. In the purchaser's suit to recover the cost of placing a concrete culvert in the ditch, the court held that there is no liability for patent defects that are discoverable by the exercise of ordinary diligence. *Id.* at 237, 96 So. at 163. However, since the purchaser was justified in presuming that no reasonable man would construct a house upon such a foundation and since the result of that act was not noticeable upon inspection, the vendor was liable to his purchaser for damages. *Id.* at 238, 96 So. at 163.

[7] *See, e.g.*, Corley v. Reed, 164 Miss. 678, 692, 145 So. 241, 244 (1933) (no fraud where vendor's representations concerning farm were within vendee's means of determining the truth); Hall v. Thompson, 9 Miss. (1 S. & M.) 443, 481-82 (1843) (nondisclosure of facts by vendor is not fraud where vendee undertakes to examine tract of land for himself). In Koch v. H & S Dev. Co., 249 Miss. 590, 163 So. 2d 710 (1964), the court gave a very forceful description of the caveat emptor doctrine:

The rule of caveat emptor, as yet, is still operative. Provided it is not illegal or

In *Brown v. Elton Chalk, Inc.*,[8] the appellants purchased a new house from the appellee who had constructed and completed the house several months earlier.[9] After becoming aware of certain defects in the house, the appellants requested that the appellee make the necessary repairs[10] pursuant to a one-year warranty for defects in workmanship and materials that the appellants alleged had been represented to them both prior to and after the sale.[11] The appellee made only nominal remedial efforts and the house remained in essentially the same condition.[12] Suit was filed in the circuit court of Rankin County charging breach of an implied warranty, and the builder's demurrer to the declaration was sustained.[13] On appeal, the Mississippi Supreme Court pronounced the rule that there exists an implied warranty of habitability in the sale of a house if (1) the house is new and (2) the plaintiff is the first purchaser.[14]

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against public policy, persons have and should have the right to contract with reference to their property, their interests therein, and the use thereof with other persons, and to rely upon the terms and conditions of the contract mutually agreed upon. Parties thus contracting should not be required to anticipate or guess how a panacean court of equity may "feel" a valid contract should be construed or enforced, because one of the contracting parties may breach the simple conditions precedent, agreed to by both parties before the contract can be renewed. The written words of the contract afford greater certainty of intention, and more accurate compliance with and performance of the terms of the contracts by the parties thereto than do the retrospective, impassive conclusions of a court of equity . . . . It is bound by a contract as the parties have made it and has no authority to substitute for it another and different agreement, and *should afford relief only where obviously there is fraud, real hardship, oppression, mistake, unconscionable results, and other grounds of righteousness, justice, and morality.*

Id. at 629-30, 163 So. 2d at 727 (emphasis added). This last phrase sets forth the rationale courts have employed in charging the builder-vendor with an implied warranty of habitability. *See generally* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931) (theory and history of the caveat emptor doctrine).

[8] 358 So. 2d 721 (Miss. 1978).

[9] Brief for Appellant at 1, Brown v. Elton Chalk, Inc., 358 So. 2d 721 (Miss. 1978).

[10] *Id.*

[11] *Id.* at 2.

[12] *Id.* at 1-2.

[13] 358 So. 2d at 721.

[14] *Id.* at 722. Although the court agreed with the appellant's argument that an implied warranty of habitability should exist in Mississippi, the case was affirmed for the builder-vendor and remanded to allow the appellants to amend their declaration since neither of the prerequisites of the warranty had been alleged. *Id.* An amended declaration was filed but the action was never retried since an out of court settlement for far less than the

The Mississippi court had confronted this issue only once before. In *Oliver v. City Builders, Inc.*,[15] the court affirmed the Hinds County Circuit Court's dismissal of a suit brought by the homeowner against the builders of his residence for damages resulting from the faulty construction of the foundation.[16] In *Oliver* the homeowners had purchased the residence from a previous owner, not a party to the lawsuit, who had acquired it from the builder-vendor more than two years earlier.[17] The court in *Oliver* categorized the cases cited by appellant in support of the imposition of liability as (1) those involving an implied warranty of habitability made to the builder-vendor's direct vendee, and (2) those where damage or injury resulted from a manufactured product, such as a water heater, that had been installed in the house.[18] The latter category referred to factual situations such as that in *State Stove Manufacturing Co. v. Hodges*,[19] where the Mississippi Supreme Court adopted a theory of strict liability in tort for products liability cases.[20] The court noted that such a theory was properly applicable to manufactured devices or products that retain their identity,[21] but not to a residence composed of an infinite variety of components which the purchaser was free to accept in any condition he deemed satisfactory.[22] In the bargaining process, the court reasoned, the purchaser would inevitably waive certain defects in the builder-vendor's aggregate product.[23] To adopt the strict liability concept in such real estate transactions would, according to the court, produce anomolous results since it would

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$120,000 originally demanded was reached. Correspondence with John C. McLaurin, Attorney for Appellee, (March 16, 1979).

[15] 303 So. 2d 466 (Miss. 1974).

[16] *Id.* at 469.

[17] *Id.* at 466.

[18] *Id.* at 467.

[19] 189 So. 2d 113 (Miss. 1966). The action was brought by the owners of a house that was destroyed by the explosion of a defective water heater. *Id.* at 115. The Mississippi Supreme Court adopted the strict products liability doctrine and eliminated the privity requirement between consumers and manufacturers. *Id.* at 115, 118. The case was also significant because the court did not find it necessary to impose liability through an expansion of the implied warranty concept. *See generally* 38 Miss. L.J. 341 (1967); 28 Ohio S.L.J. 343 (1967); 69 W. Va. L. Rev. 230 (1967).

[20] Until this decision, Mississippi was apparently the only state that had not adopted this theory. W. Prosser, Handbook on The Law of Torts § 96, at 643 n.23 (4th ed. 1971).

[21] 303 So. 2d at 468-69.

[22] *Id.* at 468.

[23] *Id.*

allow successive parties to recover from the builder for deficiencies in workmanship upon a guarantee intended by the builder to run only to the original purchaser.[24] Although recognizing the numerous cases cited by appellants in support of their claim for the recognition of an implied warranty of habitability,[25] the court was of the opinion that the extent of erosion of the caveat emptor doctrine was very restricted[26] since in two of the typical cases cited by the appellants, *Wawak v. Stewart*[27] and *Cochran v. Keeton,*[28] the courts had refused to extend an implied warranty to remote purchasers.[29] In addition, the court observed in *Oliver* that three of the seven justices in the *Wawak* decision had dissented "from that strictly limited departure from existing law"[30] and had intimated that it was within the legislative rather than the judicial sphere to impose an implied warranty that would so greatly affect the existing methods of doing business.[31] Finally, in refusing to adopt an implied warranty of habitability, the court reiterated what had been expounded as the leading argument against such warranties—the doctrine of merger, which requires that all negotiations of the bargaining process be incorporated into the terms of the final writing.[32]

Despite the fact that the court refused to adopt an implied warranty of habitability in *Oliver,* the nature of the holding in that case nevertheless suggested the direction the court would later follow in *Brown.* The concurring opinion of Justice Inzer, joined by four other justices, agreed with the majority opinion only insofar as it held that an implied warranty of habitability did not extend to remote purchasers.[33] As between a builder-

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[24] *Id.* at 469.

[25] *Id.* at 467.

[26] *Id.*

[27] 247 Ark. 1093, 449 S.W.2d 922 (1970), *commented on in* Young and Harper, *Quare: Caveat Emptor or Caveat Venditor?,* 24 ARK. L. REV. 245 (1970).

[28] 287 Ala. 439, 252 So. 2d 313 (1971), *noted in* 24 ALA. L. REV. 332 (1972).

[29] 303 So. 2d at 467-68.

[30] *Id.* at 468.

[31] *Id.* Louisiana appears to be the only state that has passed a statute making a builder liable upon an implied warranty theory for structural defects. *See* LA. CIV. CODE ANN. art. 2520 (West 1952).

[32] 303 So. 2d at 469. Although the merger doctrine was originally considered an impediment to the implied warranty theories, courts have held it inapplicable to those situations not involving title to the property. *See generally* Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It,* 52 CORNELL L.Q. 835, 857-62 (1967).

[33] 303 So. 2d at 469 (Inzer, J., specially concurring).

vendor of a residential house and his direct purchasers, however, the concurring justices stated that an implied warranty of habitability should exist.[34] The remaining three justices dissented, arguing that the privity requirement adopted by the concurring opinion was not necessary to hold the builder-vendor liable.[35] They argued that this situation was no different from that presented eight years earlier in *State Stove* where the court announced that the doctrine of strict liability was applicable not only to the manufacturer-seller of a defective water heater but also to the contractors of the house into which it was placed.[36] The dissent also emphasized that in the present case the suit against the builder-vendor was buttressed by the fact that he was also the "manufacturer, designer, contractor, builder, and seller all rolled into one."[37]

The hesitancy of the judiciary to abolish the caveat emptor doctrine in the sale of houses has apparently ended.[38] With few exceptions,[39] the rapidly accelerating trend has been one of fashioning some type of protection for the home buyer.[40] The preced-

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[34] *Id.* at 470.

[35] *Id.* (Robertson, J., dissenting).

[36] *Id.* at 470-73.

[37] *Id.* at 472.

[38] As late as 1965, Professor Haskell stated: "The trend is in the direction of further protection for the purchaser of real property, *but caveat emptor still dominates the field.*" Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 655 (1965) (emphasis added). Only twelve years later, one commentator listed 24 jurisdictions that have afforded some type of implied warranty protection to the home buyer. *See* Comment, *Implied Warranties in New House Constitution: Caveat Ohio Purchasers*, 46 U. CIN. L. REV. 207, 212 n.39 (1977). Mississippi has now brought that total to a near majority. *Compare* the statement made in Annot., 78 A.L.R.2d 446, 447 (1961), "the rule that no such implied warranty exists [as to sellers of a new dwelling] appears to be well established in most jurisdictions . . ." *with* the statement in Annot., 25 A.L.R.3d 383, 391 (1969), "that where the vendor is also the builder, he is today, by the weight of modern authority, held liable for damages and injuries occurring after the surrender of title and possession, on one or more of three theories: (1) implied warranty . . . ."

[39] *See* Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515, 517 (1971) (no implied warranty of habitability because of merger doctrine); Worthington Constr. Corp. v. Moore, 266 Md. 19, 291 A.2d 466, 467 (1972) (no implied warranties absent exceptional circumstances); Benson v. Dorger, 33 Ohio App. 2d 110, 292 N.E.2d 919, 921 (1972) (builder-vendor of residence not liable to vendee under implied warranty theory).

[40] See notes 41 through 73 and accompanying text *infra*. Although the cases most often speak of an implied warranty of habitability, the courts have been rather ingenious in providing other descriptions of the warranty. Some of the more popular ones include implied warranty of fitness, implied warranty of workmanlike construction, implied war-

ent for the earliest decisions in this country charging the builder-vendor with an implied warranty of habitability was the 1931 English case of *Miller v. Cannon Hill Estates.*[41] In *Miller* the plaintiff had purchased a house that was still under construction.[42] Upon completion, the purchaser found the house unfit for habitation because of faulty construction.[43] The court held that there should be "an implication of law that the house shall be reasonably fit for . . . human dwelling."[44] The court emphasized, however, that the warranty existed only with regard to the purchase of a house yet to be completed, and did not extend to a house ready for sale where the purchaser had the option to reject the completed product.[45] A similar holding concerning a substantially completed house was announced six years later in *Perry v. Sharon Development Co.,*[46] where the court again distinguished the purchase of a house under construction from that of a completed one.[47]

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ranty of merchantability, implied warranty of fitness for habitation, and implied warranty of fitness for use intended and reasonably good and workmanlike construction. *See generally* Annot., 25 A.L.R.3d 383, 414 (1969); Comment, *Developments in Actions for Breach of Implied Warranties of Habitability in the Sale of New Houses,* 10 TULSA L.J. 445, 445 n.1 (1975).

[41] [1931] 2 K.B. 113. For an excellent commentary on the *Miller* case and its effect upon the law in this country, see Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule,* 14 VAND. L. REV. 541, 543-47 (1961).

[42] [1931] 2 K.B. at 113.

[43] *Id.* at 114-15.

[44] *Id.* at 121.

[45] *Id.* at 120-21.

[46] [1937] 4 All E.R. 390.

[47] The court stated:

> There is obviously a difference in kind between a contract for the sale of a house which is an existing and complete structure and a contract for the sale of an uncompleted house which has to be completed by the vendor. In the former case . . . the maxim *caveat emptor* clearly applies to the full when the purchaser inspects the house by himself, or by his surveyor, and makes up his mind as to its condition and fitness for occupation. [As for] [t]he other type of house, a house only partly erected, or to be completed . . . the maxim caveat emptor cannot apply, and the buyer, insofar as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, insofar as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly.

Id. at 395-96. Although quoted from *Perry,* this passage contains the essence of what the courts and commentators in this country refer to as the *Miller* doctrine.

In this country, situations prompting the adoption of a warranty of habitability in the sale of houses did not arise until after the post-World War II housing boom.[48] The utilization of mass production methods in the housing market and the subsequent effect on quality motivated the courts to develop some type of relief for the discontented home buyer.[49] Unfortunately, that relief was predicated on the rationale of the earlier English decisions.[50] In *Vanderschrier v. Aaron*,[51] the Ohio Court of Appeals, acknowledging the few cases on the question of an implied warranty of habitability,[52] cited the English case *Perry v. Sharon Development Co.* with approval and allowed recovery to the purchaser of a house the sale of which had been contracted for during construction.[53] The court found no need to decide whether the implied warranty of habitability would have applied to the purchase of a completed house,[54] although it did note the "evervarying circumstances surrounding such sales"[55] and stated that an implied warranty of habitability "does not generally" exist.[56] A year later, in *Hoye v. Century Builders, Inc.*,[57] the Washington Supreme Court employed the *Miller* doctrine and found an implied warranty of habitability in favor of the purchasers of a house that had been specifically built for them.[58] The *Hoye* court appears to have rationalized its holding by emphasizing the facts that the builder had held himself out as specially

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[48] *See* Bearman, *supra* note 41, at 542.

[49] *Id.*

[50] *See* Roberts, *supra* note 32, at 837-39; Comment, *supra* note 40, at 446. The English rationale, termed the *Miller* doctrine, has been justifiably criticized. As Bearman pointed out:

> [T]he vendee who purchased his home one day before completion receives an implied warranty that his house is free from structural defects, while his neighbor, who by chance signed his contract the next day, buys without the implied warranty . . . . It would seem that the *Miller* court should have either rejected the implied warranty altogether or applied it in both situations.

Bearman, *supra* note 41, at 546.

[51] 103 Ohio App. 340, 140 N.E.2d 819 (1957).

[52] 140 N.E.2d at 821.

[53] *Id.* (citing Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390).

[54] 140 N.E.2d at 821.

[55] *Id.*

[56] *Id.*

[57] 52 Wash. 2d 830, 329 P.2d 474 (1958).

[58] 329 P.2d at 476.

qualified and experienced[59] and that such a representation is always "an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use."[60]

It was not until the 1964 decision in *Carpenter v. Donohue*[61] that the purchaser of a completed house was accorded protection. There the Supreme Court of Colorado elected to expand its previous holding in *Glisan v. Smolenske*,[62] which had applied the *Miller* doctrine in finding an implied warranty of habitability in the sale of an unfinished house.[63] The court cited a widely recognized article criticizing the distinction between the sale of completed and uncompleted houses,[64] and stated:

> That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.[65]

It was not long before other jurisdictions followed suit, as indicated by the emergence of numerous well-written decisions justifying this new remedy.[66] For example, in *Humber v. Morton*,[67] the Supreme Court of Texas acknowledged the "rapid sickening of the caveat emptor doctrine as applied to sales of *new* houses"[68]

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[59] *Id.*

[60] *Id.* (quoting Hill v. Poplar Pantries, 219 S.C. 263, 64 S.E.2d 885, 888 (1951)).

[61] 154 Colo. 78, 388 P.2d 399 (1964).

[62] 153 Colo. 274, 387 P.2d 260 (1963).

[63] 387 P.2d at 262. Unlike the Mississippi court, many courts followed this pattern of adopting an implied warranty of habitability for finished houses by expanding a prior decision that had employed the *Miller* doctrine. *See, e.g.*, House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199, 203-04 (1969) (expanding the decision in Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958)), *noted in* 45 WASH. L. REV. 670 (1970).

[64] 388 P.2d at 402. The article referred to was Bearman, *supra* note 41.

[65] 388 P.2d at 402.

[66] *See, e.g.*, Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Pollard v. Saxe and Tolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Theis v. Heuer, 149 Ind. App. 52, 280 N.E.2d 300 (1972); Weeks v. Slavik Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970); Smith v. Old Warsaw Dev. Co., 479 S.W.2d 795 (Mo. 1972); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (1973). It is interesting to note that in Gable v. Silver, 258 So. 2d 11 (Fla. App. 1972), the habitability warranty was extended to purchasers of condominiums. *Id.* at 18.

[67] 426 S.W.2d 554 (Tex. 1968).

[68] *Id.* at 558 (emphasis added).

and found that modern home buying practices demanded that this anachronism be abrogated.[69] The court stated that the caveat emptor rule as applied to new houses "does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work."[70]

This widespread following of the *Carpenter* decision has been described by one court as "a modern trend of well-reasoned authorities."[71] Nevertheless, a few courts that have subsequently allowed a purchaser to recover on an implied warranty cling to the *Miller* doctrine.[72] Although preferable to no implied warranty remedy at all, this approach leaves much to be desired. By not using this doctrine as an intermediate step in the adoption of an implied warranty of habitability for new houses, Mississippi appears to have taken the more logical approach.

II. Apportionment of Estate Tax

Although Congress has decided that the transferring of assets at death is a taxable event,[73] it has failed to declare who is liable for the levy.[74] Until many states began to resolve this problem through the use of apportionment statutes, the common law

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[69] *Id.* at 562.

[70] *Id.*

[71] Theis v. Heuer, 149 Ind. App. 52, 280 N.E.2d 300, 304 (1972).

[72] *See, e.g.*, Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963).

[73] I.R.C. § 2001(a). This decision has been judicially approved. *See* New York Trust v. Eisner, 256 U.S. 345, 348-49 (1921) (estate tax); Knowlton v. Moore, 178 U.S. 41, 58-61 (1900) (inheritance tax). For a distinction between the inheritance and estate taxes, see 1 R. Paul, Federal Estate and Gift Taxation § 1.05, at 19 (1942).

[74] There exists a possible ambiguity on the point. Section 2205 of the Internal Revenue Code provides that the recipient of any property who pays any of the estate tax is

> entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes.

I.R.C. § 2205. Whereas a congressional intent to apportion the liability could be implied from this language, courts have interpreted the statute differently. *See* Riggs v. Del Drago, 317 U.S. 95, 100-01 (1942). *See generally* C. Lowndes, R. Kramer & J. McCord, Estate and Gift Taxes § 21.18, at 634-35 (3d ed. 1974); 1 R. Paul, *supra* note 73, § 13.54, at 774; Susman and Fourtiq, *Apportionment of Death Taxes: A Comprehensive Survey With Proposed Statute*, 45 Tex. L. Rev. 1348, 1361-62 n.71 (1967).

"burden on the residue" rule[75] was often responsible for the destruction of apparently well-planned testamentary dispositions.[76] Today, a majority of states have created either judicially or legislatively some type of apportionment rule.[77] Mississippi is among the minority that has no such rule.

In *Stovall v. Stovall,*[78] a prominent attorney devised in a holographic will an estate valued at over two million dollars to his two sons.[79] One son, Richard, was devised most of the testator's realty, while the other son, Robert, received most of the testator's personalty.[80] Although the dispositions were roughly equivalent in value, Robert's share bore most of the estate tax burden because of the application of Mississippi's abatement procedure.[81] Robert's suit in chancery court asking that the will be construed "to manifest an intent that the estate tax burden . . . be apportioned among the properties" was unsuccessful.[82] The Mississippi Supreme Court affirmed the decision of the lower court, stating that Mississippi does not have an apportionment statute for such situations and that, furthermore, it has two statutes that specifically negate any apportionment of the estate tax.[83] In effect, the court

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[75] This rule requires that the tax be paid from the residue of the estate. See cases cited in note 97 *infra.*

[76] *See* R. STEPHENS & G. MAXFIELD, THE FEDERAL ESTATE AND GIFT TAXES 271 (2d ed. 1972).

[77] For a list of the states having apportionment statutes and those that do not, see FED. TAXES (P-H) ¶¶ 120.025-.026 (1978). This issue has been the subject of numerous law review articles. In addition to those cited elsewhere in this writing, see Fleming, *Apportionment of Federal Estate Taxes,* 43 ILL. L. REV. 153 (1948); Lindsay, *Florida's Estate Tax—Apportionment Versus a Charge Against Residue,* 12 U. FLA. L. REV. 50 (1959); Susman and Fourticq, *supra* note 74, at 1348; Sutter, *Apportionment of the Federal Estate Tax in the Absence of Statute or an Expression of Intention,* 51 MICH. L. REV. 53 (1952); Comment, *Equitable Apportionment of Federal Estate Tax in Arizona,* 17 ARIZ. L. REV. 1135 (1975); Note, *Statutory Apportionment of Federal Estate Taxes,* 62 HARV. L. REV. 1022 (1949).

[78] 360 So. 2d 679 (Miss. 1978).

[79] *Id.* at 680.

[80] *Id.*

[81] *Id.* Basically, the abatement procedure requires that the decedent's personalty be exhausted before his realty may be used to satisfy debts of the estate. MISS. CODE ANN. §§ 91-7-91, -191 (1972); *see* 41 MISS. L.J. 346, 349 (1970).

[82] 360 So. 2d at 680.

[83] *Id.* The statutes are MISS. CODE ANN. §§ 91-7-91, -191, which provide:

> The goods, chattels, personal estate, choses in action, and money of the deceased, or which may have accrued to his estate after his death from the sale of property, real, personal, or otherwise, and the rent of lands accruing during the years of his death, whether he died testate or intestate, shall be assets and shall

concluded, those statutes placed realty in a "position paramount to that of personalty."[84] The court added that if the testator had intended a different result he could have so provided in his will.[85] Since the will was not ambiguous on its face, the court reasoned that no extrinsic evidence to show such an intent could be admitted.[86]

Stovall illustrates the unfortunate situation that may arise when a state lacks a statute apportioning the federal estate tax.[87] Generally, the widow, children or dependents are left the residue of the decedent's estate.[88] With the broad scope of the estate tax provisions and the inclusion of property that a testator would not otherwise consider part of his gross estate, these residuary legatees may receive far less than the testator had intended.[89]

The Revenue Act of 1916, enacted for the purpose of funding

> stand chargeable with all the just debts, funeral expenses of the deceased, and the expenses of settling the estate. The lands of the testator or intestate shall also stand chargeable for the debts and such expenses over and above what the personal estate may be sufficient to pay, and may be subjected thereto in the manner hereinafter directed . . . .

Id. § 91-7-91 (Supp. 1978).

> When an executor or administrator shall discover that the personal property will not be sufficient to pay the debts and expenses he may file a petition in the chancery court for the sale of the land of the deceased, or so much of it as may be necessary, and exhibit to the court a true account of the personal estate and debts due from the deceased, and the expenses and a description of the land to be sold.

Id. § 91-7-191 (1972).

[84] 360 So. 2d at 680-81.

[85] *Id.* at 681.

[86] *Id.; see* Seal v. Seal, 312 So. 2d 19, 21 (Miss. 1975).

[87] For an example illustrating the possible unforeseen consequences of the federal estate tax upon the residuary estate, see *In re* Mellon's Estate, 347 Pa. 520, 32 A.2d 749 (1943), *discussed in* Comment, *The Apportionment Doctrine—A Proposed Ohio Estate Tax Apportionment Statute,* 41 U. CIN. L. REV. 897, 904 (1972).

[88] Willoughby, *Federal Estate Taxation—Testator's General Direction Against Apportionment—Effect Upon Nonprobate Property,* 46 ORE. L. REV. 199, 206 (1967).

[89] The federal tax statutes provide that the decedent's gross estate shall include: (1) all transfers made within three years of death, *id.* § 2035; (2) transfers with a retained life estate, *id.* § 2036; (3) transfers taking effect at decedent's death, *id.* § 2037; (4) transfers in which the decedent retained the right to alter, amend, revoke or terminate, *id.* § 2038; (5) annuities payable to the decedent, *id.* § 2039; (6) property in which the decedent had a joint interest, *id.* § 2040; (7) property over which the decedent possessed a power of appointment, *id.* § 2041; (8) life insurance proceeds, *id.* § 2042; and (9) transfers for an insufficient consideration, *id.* § 2043. *See generally* R. STEPHENS & G. MAXFIELD, *supra* note 76, at 36-161.

the country's war efforts,[90] was the forerunner of our present estate tax structure.[91] Despite the approval of such noted personalities as Theodore Roosevelt,[92] the tax had little popular support and was considered by many to be socialistic.[93] Since the maximum rate under that Act was ten percent,[94] it mattered little which portion of the estate was held liable for the tax. Congress found it sufficient merely to state that the executor was responsible for payment[95] from whatever source the testator or state law dictated.[96] What evolved from this silence was the "burden on the residue" rule, a judicial interpretation that the tax was to be paid from the residue of the estate.[97]

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[90] Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756. For a more complete history of the federal estate tax, see Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 223-36 (1956). *See also* 1 R. PAUL, *supra* note 73, § 1.02, at 6.

[91] 1 J. MERTENS, LAW OF FEDERAL GIFT AND ESTATE TAXATION § 2.01, at 52 (1959).

[92] *See* Eisenstein, *supra* note 90, at 228.

[93] *Id.* at 229.

[94] Revenue Act of 1916, Pub. L. No. 64-271, § 201, 39 Stat. 777.

[95] Section 2002 of the Internal Revenue Code prescribes that the executor is liable for the tax. I.R.C. § 2002. Two statutes, however, specifically provide for the apportionment of the tax burden. Section 2206 allows the executor to recover from beneficiaries that portion of the increased estate tax burden arising from the inclusion of life insurance proceeds under § 2042. *Id.* §§ 2206, 2042. Section 2207 likewise allows the executor to recover the increased estate tax incurred because of the inclusion in the gross estate under § 2041 of property passing to the legatees through the exercise, nonexercise, or release of a decedent's general power of appointment. *Id.* §§ 2207, 2041.

[96] We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution.

53 CONG. REC. app., at 1942 (1916).

[97] This interpretaion was followed in nearly all jurisdictions. *See* Thompson v. Union Mercantile Trust Co., 164 Ark. 411, 262 S.W. 324, 326 (1924) (federal estate tax not to be apportioned against the widow's dower); Brown's Estate v. Hoge, 198 Iowa 373, 199 N.W. 320, 321 (1924) (federal estate tax an administrative expense payable from the residuary estate); Central Trust Co. v. Burrows, 144 Kan. 79, 58 P.2d 469, 470 (1936) (gifts in contemplation of death); Bemis v. Converse, 246 Mass. 131, 140 N.E. 686, 687 (1923) (residuary estate liable for estate tax arising from inter vivos trust); Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N.H. 471, 200 A. 786, 789 (1938) (residuary estate bequeathed to college liable for federal estate tax); Farmers' Loan and Trust Co. v. Winthrop, 238 N.Y. 488, 144 N.E. 769, 771 (1924) (residuary estate liable for estate tax arising from inter vivos trust). Until the Supreme Court decision in Riggs v. Del Drago, 317 U.S. 95, 102 (1942), *discussed in* notes 120 through 126 *infra*, only a few jurisdictions departed from the majority by ruling in favor of apportionment between the residuary estate and property passing under the will. *See* Henderson v. Usher, 125 Fla. 709, 170 So.

Early opposition to the practice of apportioning the estate tax among legatees was strong. In *In re Hamlin,*[98] the New York Court of Appeals refuted the argument that the statutory phrase "just and equitable contribution" called for the apportionment of the estate tax,[99] reasoning that had Congress intended to impose the tax among the legatees it would have so stated.[100] The court emphasized that, rather than imposing an "inheritance tax" that would place the burden on the legatees, the 1916 Act imposed an "estate tax," which, presumably, is by definition an apportioned tax.[101] This position was adopted just four months later by the Massachusetts Supreme Judicial Court in *Plunkett v. Old Colony Trust Co.*[102] The Massachusetts court found the 1916 Act to be an estate tax rather than an inheritance tax because the object of taxation under the Act was the "net estate,"[103] with transfers from the estate to the legatees totally ignored in determining the composition of this "net estate."[104] A second argument used by the court to support the "burden on the residue" rule that was also used by the *Hamlin* court was that the War Revenue Act of 1898 had plainly levied a tax on particular dispositions rather than on the gross estate itself.[105] Thus, congressional intent could be surmised by noting that this apportionment language was absent from the Revenue Act of 1916.[106] The court stated:

> [I]f Congress had intended to levy a tax on legacies and distributive shares, it naturally would have adopted the words of the Act of 1898, which had been already used and whose signification had been established by the highest judicial authority. Employment of other language of quite different import indicates a change of purpose.[107]

It was not long before the Supreme Court of the United

846, 853-54 (1936) (federal estate tax to be apportioned against the widow's dower); Hampton's Admirals v. Hampton, 188 Ky. 199, 221 S.W. 496, 497 (1920) (same).

[98] 226 N.Y. 407, 124 N.E. 4 (1919).

[99] 124 N.E. at 7.

[100] *Id.*

[101] *Id.* at 6-7.

[102] 233 Mass. 471, 124 N.E. 265 (1919).

[103] 124 N.E. at 266.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

States affirmed these judicial interpretations deciding which portion of the estate bears the estate tax burden. In *YMCA v. Davis,*[108] the Ohio Supreme Court held that despite the fact that the testator's residuary dispositions to certain charities prompted an exemption from the estate tax, the burden of the levy was meant to fall upon the residuary estate.[109] Citing *Hamlin* and *Plunkett* with approval,[110] the court recognized that the general rule imposed the legal charges upon the estate as a whole without regard to the nature of its legacies or bequests.[111] The effect of that rule, therefore, was that the specific legacies and bequests survived the obligations of the estate.[112] The Supreme Court of the United States affirmed the decision,[113] noting that although the petitioner's arguments were persuasive, the intention of Congress, looking at the situation from the view point of the testator rather than from that of the beneficiaries,[114] was to encourage the testator to make specific legacies and bequests rather than to exempt charitable bequests from the payment of the tax liability.[115]

Except in a few jurisdictions, the "burden on the residue" rule was widely followed.[116] Cognizant of the unfortunate consequences of encumbering the residue with the estate levy,[117] the Decedent Estate Commission of New York recommended in 1930 the adoption of a statute that would apportion the estate tax. The resulting addition to the Decedent Estate Laws, section 124, provided for the equitable apportionment of estate taxes.[118] Unfor-

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[108] 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd,* 264 U.S. 47 (1924).

[109] 140 N.E. at 115.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] 264 U.S. 47, 50 (1924).

[114] *Id.*

[115] *Id.*

[116] See note 97 and accompanying text *supra.*

[117] The Commission was aware that in most instances the estate tax "must be borne by the residuary legatee or legatees. Experience has demonstrated that in most estates the residuary legatees are the widow, children, or nearer and more dependent relatives." New York Commission To Investigate Defects in the Law of Estates, Combined Reports of the Commission To Investigate Defects in the Laws of Estates 338 (reprint ed. 1935) *cited in* Comment, *Apportionment of the Federal Estate Tax—Should North Carolina Adopt An Apportionment Statute?;* 52 N.C.L. REV. 737, 739-40, n.22 (1974).

[118] N.Y. DECEDENT ESTATE LAW § 124, ch. 709, Laws of 1930, *presently codified at* N.Y. EST., POWERS & TRUSTS LAW § 2-1.8 (McKinney 1967). *See generally* Sheffield, *Notes on*

tunately, the question of the statute's constitutionality precluded the enactment of similar legislation in other jurisdictions.[119] The Court of Appeals of New York, in *Matter of Del Drago,*[120] found that the statute violated the supremacy and uniformity clauses of the Constitution, stating that the statute was clearly incongruent with section 826(b)[121] of the Internal Revenue Code.[122] The Court of Appeals reasoned that although the state had the inherent right to prescribe the manner of devolution of property within its jurisdiction,[123] congressional silence concerning who would pay the tax was not a mandate for state interference.[124] When brought before the United States Supreme Court,[125] the decision was reversed, and Mr. Justice Murphy expressed what had been implied in prior holdings—state laws governing the ultimate distribution of the estate are constitutional.[126]

Mississippi has long adhered to the doctrine that, absent a contrary testamentary direction, the decedent's personalty is to be completely exhausted before charges and debts of the estate are to be levied against his realty.[127] Within the personal estate the residuary bears the burden.[128] In 1858, the Mississippi Supreme Court stated that "the rule is well settled that the residuary legatees have no right to call upon particular general legatees to abate. The whole personal estate, not specifically bequeathed, must be exhausted before those legatees can be compelled to contribute anything out of their bequest."[129] This posi-

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Equitable Apportionment of Federal Estate Taxes—A Consideration of the New York Statute, 19 CONN. B.J. 6 (1945).

[119] *See* Comment, *supra* note 87, at 900.

[120] 287 N.Y. 61, 38 N.E.2d 131, 132 (1941), *rev'd,* 317 U.S. 476 (1943).

[121] Int. Rev. Code of 1939, ch. 3, § 826(b), 53 Stat. 128 (presently I.R.C. § 2205).

[122] 38 N.E.2d at 140.

[123] *Id.*

[124] *Id.* at 138.

[125] 317 U.S. 95, 101-02 (1942), *noted in* 9 U. CHI. L. REV. 528 (1942). *See also* Comment, *supra* note 87, at 900-03. This position was later reaffirmed in Harrison v. Northern Trust Co., 317 U.S. 476, 481 (1943).

[126] 317 U.S. at 102. The Court reasoned that "[C]ongress intended that the federal estate tax should be paid out of the estate as a whole, and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax. . . ." *Id.* at 97-98.

[127] *See* MISS. CODE ANN. §§ 91-7-91, -191 (1972 & Supp. 1978); 41 MISS. L.J. 346, 349 (1970).

[128] See note 81 *supra.*

[129] Currie & Naylor v. Murphy, 35 Miss. 473, 486 (1858).

tion has been adhered to with blinding consistency.[130] Not until the Tax Court case of *Morrison v. Commissioner,*[131] which arose in Mississippi, was the precise issue of estate tax apportionment confronted. In *Morrison,* the husband of the decedent was left a specific devise of real estate with the residuary estate to go to the decedent's two sons.[132] Payment of the estate tax was made from a bank account that was to pass under the residuary clause of the will.[133] The Tax Court, acknowledging that Mississippi law was determinative,[134] held that absent an apportionment statute or a direction by the testator the residuary estate should be burdened with the levy.[135] Even though the Mississippi code used the terms "estate tax" and "inheritance tax" interchangeably, the Tax Court considered the former more appropriate since the Mississippi code section on estate taxes was patterned after the federal code.[136]

The Mississippi Supreme Court reiterated this position in *Estate of Torian v. First National Bank.*[137] The residuary legatees of the decedent's will appealed from a decree denying the executor's petition to transfer jurisdiction to Arkansas, the decedent's domicile at date of death.[138] Arkansas had an apportionment statute;[139] Mississippi did not. The court affirmed the chancellor's denial, noting that the contacts of the forum state were much greater than those of the domiciliary state.[140] Having assumed jurisdiction, the chancellor was not obligated to defer to the laws of Arkansas concerning any apportionment of the estate tax.[141]

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[130] *See* Riegelhaupt v. Ostroffsky, 237 Miss. 521, 531, 115 So. 2d 331, 336 (1959) (realty not subject to debts until personalty is exhausted); Gaines v. Klein, 203 Miss. 271, 275, 34 So. 2d 489, 490-91 (1949) (same); Eatherly v. Winn, 185 Miss. 742, 754, 189 So. 99, 103 (1939) (same); Gidden v. Gidden, 176 Miss. 98, 113, 167 So. 785, 792 (1936) (same); Gordon v. James, 86 Miss. 719, 750, 39 So. 18, 23 (1905) (same).

[131] Morrison v. Commissioner, 24 T.C. 965 (1955).

[132] *Id.* at 966-67.

[133] *Id.* at 966.

[134] *Id.* at 968.

[135] *Id.* at 972-73.

[136] *Id.* at 969.

[137] 321 So. 2d 287 (Miss. 1975).

[138] *Id.* at 288.

[139] *Id.* at 290. The statute was ARK. STAT. ANN. § 63-150 (1947).

[140] 321 So. 2d at 290.

[141] *Id.* at 291; *see* MISS. CODE ANN. §§ 91-7-31, -33, -35 (1972) (Mississippi's probate procedure).

Therefore, Mississippi law controlled, and the "burden on the residue" rule was held applicable.[142]

While the adoption of an apportionment statute in Mississippi would alleviate some of the aforementioned problems, the operation of such a statute is not without difficulties, as evidenced by the number of states that, after *Del Drago,* adopted such a statute and later repealed it.[143] Generally, the repealed statutes wre poorly drafted[144] and failed to encompass situations where (1) the property comprising the estate was located in jurisdictions not requiring apportionment,[145] or (2) apportionment, based upon a graduated tax scale, inequitably affected particular dispositions.[146]

The need for an apportionment statute does not arise if the testator's will sufficiently indicates his intent regarding payment of the estate tax.[147] That intent must be determined from the will itself, however, since absent an ambiguity no extrinsic evidence may be admitted to establish intent and thereby alter the statutory rules on abatement.[148] Curing the resulting uncertainty in operation of the testator's dispositions would constitute the greatest advantage of adoption of an apportionment statute. Whether legislatively or judicially adopted, the rule would assure the testator that the tax, often greater than expected, would be spread among all beneficiaries so as to forestall any unexpected result.

John Malcolm McLarty

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[142] 321 So. 2d at 293.

[143] For an explanation of why some of these statutes were repealed, see Mitnick, *State Legislative Apportionment of the Federal Estate Tax,* 10 MD. L. REV. 287, 327-28 (1949).

[144] For proposed acts with commentary describing how the problems that many jurisdictions have encountered may be curtailed, *see generally* Comment, *supra* note 117, at 755-67; Comment, *supra* note 87, at 919-25. The Uniform Estate Tax Apportionment Act (1964 revision) is found in 8 UNIFORM LAWS ANNOTATED 169-179 (1972). *See also* Scoles and Stephens, *The Proposed Uniform Estate Tax Apportionment Act,* 43 MINN. L. REV. 907 (1959) (criticism of the Uniform Estate Tax Apportionment Act).

[145] *See* Doetsch v. Doetsch, 312 F.2d 323 (7th Cir. 1963) (law of domicile of deceased settlor rather than law of situs of assets controls). *See generally,* Scoles *Apportionment of Federal Estate Taxes and Conflict of Laws,* 55 COLUM. L. REV. 261, 266-67 (1955).

[146] *See In re* Mollenhauer's Will, 257 App. Div. 286, 13 N.Y.S.2d 619, 621-22 (1939) (example where $10,000 bequest diminshed by one-third as a result of the tax on a $3,000,000 estate).

[147] *See* Temple v. First Nat'l Bank, 202 Miss. 92, 100-02, 30 So. 2d 605, 607-08 (1947) (intent to protect bequests against abatement controlled).

[148] "The will of the testator is the supreme law. That being silent, or not showing a contrary desire, the statute will control." Gordan v. James, 86 Miss. 719, 754, 39 So. 18, 25 (1905).

RECENT DECISIONS

CONSTITUTIONAL LAW—PREJUDGMENT ATTACHMENT OR REAL PROPERTY—MISSISSIPPI'S CHANCERY ATTACHMENT STATUTES VIOLATE DUE PROCESS

A nonresident complaint brought suit against MPI, Inc. (MPI) in chancery court in Mississippi[1] and simultaneously invoked Mississippi's attachment in chancery procedure.[2] Based upon allegations that MPI was a nonresident corporation[3] owning real property within the state,[4] a writ of attachment was issued by the chancery clerk and executed upon MPI's real property.[5] MPI then sought an injunction in federal district court[6] to enjoin the chancery court action[7] and a declaration that Mississippi's attachment in chancery procedure was unconstitutional[8] under the due process clause of the fourteenth amendment to the Constitution.[9] Defendants contended that an attachment of real property alone was insufficient to invoke the safeguards of due process.[10]

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[1] The bill of complaint, filed in the Chancery Court of the First Judicial District of Chickasaw County, Mississippi, sought a sum of money and specific performance of an employment contract performed entirely outside the state of Mississippi. Specifically, the complainant alleged that pursuant to a written contract, upon termination of his employment with MPI in an executive position, the complainant was entitled to a $38,000 bonus and 20,000 shares of MPI stock to be issued to him at $3.25 per share and which MPI was contractually obligated to repurchase at a higher book value per share. In addition, the complainant sought interest, reasonable attorneys' fees and all costs. MPI, Inc. v. McCullough, 463 F. Supp. 887, 888-89 (N.D. Miss. 1978).

[2] MISS. CODE ANN. §§ 11-31-1 to -11 (1972). *See generally* V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE §§ 483-490 (2d ed. 1950) (discussing Mississippi's entire chancery attachment scheme).

[3] MPI, a Texas corporation, was authorized to do business in Mississippi under MISS. CODE ANN. § 79-3-211 (1972).

[4] The real estate in question was located in Houston, Mississippi, where MPI's manufacturing plant was situated. 463 F. Supp. at 889.

[5] Execution of the writ was carried out by the sheriff of Chickasaw County who posted the writ on MPI's real property pursuant to MISS. CODE ANN. § 11-31-5 (1972), and filed notice of the levy with the chancery clerk pursuant to MISS. CODE ANN. § 11-47-5 (1972). In addition, the writ was personally served upon an employee of MPI. 463 F. Supp. at 889.

[6] MPI invoked federal court jurisdiction under 28 U.S.C. § 1331 (1976) and 28 U.S.C. § 1343 (1976), basing its cause of action upon 42 U.S.C. § 1983 (1976). 463 F. Supp. at 888.

[7] 463 F. Supp. at 889.

[8] *Id.* at 888.

[9] U.S. CONST. amend. XIV, § 1.

[10] 463 F. Supp. at 892. Defendants also urged that MPI did not suffer any actual harm during the pendency of the attachment, "so that the element of irreparable injury, an essential prerequisite to injunctive relief" was absent, and issuance of an injunction was therefore improper. *Id.* at 893.

Upon hearing oral argument, the federal district court, *held*, injunction granted. The Mississippi chancery attachment statute authorizing prejudgment attachment of real property without prior notice, opportunity to challenge the validity of the attachment, or judicial supervision violates the requirements of procedural due process under the fourteenth amendment. *MPI, Inc. v. McCullough*, 463 F. Supp. 887 (N.D. Miss. 1978).

As early as the twelfth century, the English law merchant provided a means whereby merchants could satisfy their claims against nonresidents by way of attachment.[11] Later, the practice was adopted by courts at London[12] and Exeter.[13] These courts made the remedy available to any creditor within the jurisdiction of the city, thereby enabling him to attach the money or goods of his foreign debtor in the hands of a third person within the city.[14] Foreign attachment, however, was a particular custom of London and did not lie at the common law,[15] now was it within the sphere of jurisdiction of the English courts of chancery.[16]

In Mississippi, statutes regulating the means by which creditors may proceed against nonresident debtors having effects within the state existed as early as 1807.[17] The modern procedure was first enacted into

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[11] T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 664 (5th ed. 1956). The procedure, which took the form of a reprisal, provided that "if a merchant was unable to obtain justice against a foreigner in the foreigner's court, then his own government would authorize him to recoup himself out of the property of any merchant of the foreign jurisdiction in question whom he could find." *Id.*

[12] 13 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 457 (1952). Utilized under the supplemental equitable jurisdiction of the Lord Mayor's Court of London, foreign attachment was regarded as "the most prompt, efficacious, and cheapest remedy for the recovery of debts known to English law." *Id.*

[13] M. BACON, ABRIDGEMENT OF THE LAW 51-52 (1848).

[14] *See* Welsh v. Blackwell, 14 N.J.L. 344, 346 (1834) (discussing the origins of New Jersey's garnishment law).

[15] M. BACON, *supra* note 13, at 51-56 (detailing a discussion of foreign attachments in the courts of London and Exeter).

At common law, courts were reluctant to take the property of one who could not be personally served. T. PLUCKNETT, *supra* note 11, at 386. In fact, attachment originally did not involve seizures of property. Under the common law, attachment was a summary procedure for the punishment of contempts of the king, whereby an offender was summarily "attached," punished by imprisonment and released only upon payment of a fine. 3 W. HOLDSWORTH, *supra* note 12, at 391-92; *see, e.g.*, 2 W. BLACKSTONE, COMMENTARIES 283. During the sixteenth century, however, to compel the appearance of defendants, the English courts of chancery began issuing writs of sequestration authorizing the seizure of property of defendants who disobeyed summons. 9 W. HOLDSWORTH, *supra* note 12, at 348-52.

[16] Zecharie v. Bowers, 11 Miss. (3 S. & M.) 641, 643 (1844) (discussing the nature and history of nonresident attachment).

[17] Freeman v. Guion, 19 Miss. (11 S. & M.) 58, 63 (1848) (discussing the early history of chancery attachment in Mississippi).

law in 1821.[18] Under the statutes, the courts of chancery have jurisdiction over any kind of claim against any nonresident debtor who owns lands within Mississippi, who has effects in the hands of a resident, or to whom a resident is indebted.[19] Decisions of the Mississippi Supreme Court established very early that a nonresident as well as a resident complainant could invoke the chancery attachment statutes against a nonresident debtor.[20] It was also decided early on that foreign corporations authorized to do business or domesticated in the state remained "nonresidents" for the purposes of chancery attachment.[21] Even if a

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[18] V. GRIFFITH, *supra* note 2, § 483, at 488 (2d ed. 1950). According to one account the statute was copied "precisely" from a Virginia statute that had been in effect since 1744. Freeman v. Guion, 19 Miss. (11 S. & M.) 58, 64 (1848). *See also* Zecharie v. Bowers, 11 Miss. (3 S. & M.) 641, 644 (1844) (discussing the history of the Virginia statute).

The Mississippi statutes were not unlike those enacted in other states. *See generally* R. WAPLES, TREATISE ON ATTACHMENT AND GARNISHMENT 31-55 (2d ed. 1895) (discussing nonresident debtor laws and relevant case law of the various states through the late nineteenth century).

[19] MISS. CODE ANN. § 11-31-1 (1972); *see* Crescent Plywood Co. v. Lawrence, 305 So. 2d 343, 346-47 (Miss. 1974) (chancery court has no jurisdiction where resident defendant is not indebted to nonresident debtor); Universal Credit Co. v. Linn Motor Co., 195 Miss. 565, 578, 15 So. 2d 694, 696 (1943) (attachment can only be sustained where the nonresident debtor owns lands in Mississippi, has effects in the hands of a resident or is owed a debt by a resident); York v. York, 187 Miss. 465, 480, 193 So. 330, 333 (1940) (same); V. GRIFFITH, *supra* note 2, § 484, at 489-90.

The instant case involves attachment of real property alone, which is covered under MISS. CODE ANN. § 11-31-5 (1972). The chancery attachment procedure also contemplates attachment of personal property, including choses in action. This aspect of the procedure is covered under MISS. CODE ANN. § 11-31-3 (1972).

The word "effects" in the statute has been construed as "a word of very broad signification . . . and is broad enough to cover all personal property." Aetna Ins. Co. v. Robertson, 126 Miss. 387, 409, 88 So. 883, 891 (1921) (sustaining attachment of funds of nonresident insurance companies in the hands of resident agents to satisfy statutory penalties for antitrust violations). *See* Associates Discount Corp. v. Clark, 240 Miss. 723, 731, 128 So. 2d 535, 537 (1961) (attachment of automobile); Jackson State Nat'l Bank v. Polk, 35 So. 2d 430, 430 (1948) (attachment of contents of a safe deposit box); Grenada Bank v. Glass, 150 Miss. 164, 179, 116 So. 740, 742 (1928) (attachment of shares of stock); Regina Flour Mills Co. v. Lehman, 117 Miss. 575, 581-82, 78 So. 515, 516 (1918) (attachment of proceeds of a sale in the hands of a resident bank which were to accrue to a nonresident).

[20] Freeman v. Guion, 19 Miss. (11 S. & M.) 58, 65 (1848) (resident creditors); Trotter v. White, 18 Miss. (10 S. & M.) 607, 612 (1848) (nonresident creditors); Comstock v. Rayford, 9 Miss. (1 S. & M.) 423, 439 (1843) (nonresident creditors).

[21] Southern Motor Express Co. v. Magee Truck Lines, Inc., 181 Miss. 223, 229, 177 So. 653, 654 (1937) (nonresident corporations domesticated in Mississippi remain nonresidents for purposes of chancery attachment); Clark v. Louisville & Nashville R.R., 158 Miss. 287, 299, 130 So. 302, 306 (1930) (although qualified to do business in Mississippi nonresident corporations remain nonresidents for purposes of chancery attachment); Central W. Dev. Co. v. Lewis, 142 Miss. 428, 434, 107 So. 557, 558 (1926) (same).

nonresident corporation was personally served through a resident agent, it remained a nonresident within the meaning of the chancery statutes.[22] For these reasons, the procedure has been considered as operating primarily in rem.[23]

Since the basis of chancery attachment jurisdiction is statutory, it is not necessary for a complainant's bill to show an independent basis of equity.[24] A complainant is not required to post bond[25] nor is there a requirement that an attaching creditor make any showing that he is entitled to the attachment.[26] Only by posting satisfactory bond[27] or by prevailing at a trial on the merits can a defendant dissolve the attachment. Furthermore, a defendant cannot recover damages, interest, or

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[22] Clark v. Louisville & Nashville R.R., 158 Miss. 287, 304, 130 So. 302, 308 (1930); Aetna Ins. Co. v. Robertson, 126 Miss. 387, 410, 88 So. 883, 892 (1921). The consensus of these opinions is that although personal service would subject a nonresident corporation to a personal judgment, it remains a nonresident for purposes of the statute. The reasoning of these cases is that the attachments must lie since the state could not levy execution in the corporation's state of domicile upon a judgment obtained in Mississippi.

[23] Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co., 197 Miss. 751, 775, 21 So. 2d 646, 649 (1945) (procedure is primarily one in rem); V. GRIFFITH, *supra* note 2, § 484, at 489; *see* Steele v. G.D. Searle & Co., 483 F.2d 339, 343 (5th Cir. 1973) (purpose of attachment is to confer quasi in rem jurisdiction over non-residents).

[24] T.H. & J.M. Allen & Co. v. Montgomery, 48 Miss. 101, 110-11 (1873) (chancery attachment "has grown up under the statute"); Statham v. New York Life Ins. Co., 45 Miss. 581, 592-93 (1871) (basis of jurisdiction is purely statutory depending on facts stated in the statute); Scruggs v. Blair, 44 Miss. 406, 411-12 (1870) (complainant is required to show only the facts set forth in the statute and no more). The principle espoused in these cases was first enunciated in Zecharie v. Bowers, 11 Miss. (3 S. & M.) 641, 643 (1844) (chancery attachment is purely a statutory remedy). *Contra,* Aldridge v. First Nat'l Bank, 165 Miss. 1, 13, 144 So. 469, 470 (1932) (recognizing independent equity jurisdiction of chancery court, citing Clark v. Louisville & Nashville R.R., 158 Miss. 287, 313, 130 So. 302, 311 (1930) (Griffith, J., dissenting) (chancery attachment statutes created no new remedy) and Dollman v. Moore, 70 Miss. 267, 273-74, 12 So. 23, 24-25 (1892) (implicitly rejecting *Zecharie*)).

Despite the conflicting views, the court has been reluctant to expand chancery attachment beyond the letter of the law "since almost every imaginable case where relief can be afforded is within our statute." Dollman v. Moore, 70 Miss. 267, 273, 12 So. 23, 24 (1892); *see* Crescent Plywood Co. v. Lawrence, 305 So. 2d 343, 346-47 (Miss. 1974) (basis of chancery attachment jurisdiction is found in the statute); V. GRIFFITH, *supra* note 2, § 483, at 489.

[25] I.B. Rowell & Co. v. Sandifer, 129 Miss. 167, 177, 91 So. 899, 901 (1922) (no provision in statute requiring creditor to post bond); Bonds v. L. Garvey & Co., 87 Miss. 335, 336, 39 So. 492, 493 (1905) (same). Bond is required only if a plaintiff seeks to execute upon a default judgment. MISS. CODE ANN. § 11-31-11 (1972).

[26] A statement in the bill of complaint and/or summons about the nature and object of the suit is a sufficient basis for attaching a defendant's property. MISS. CODE ANN. § 11-31-3 (1972).

[27] *Id.* § 11-31-9 (1972).

attorneys' fees based on wrongful attachment except by a separate action at law for malicious prosecution.[28] Until the defendant secures release of his property, it remains in the constructive possession of the chancery court[29] and is subject to any orders the court may make.[30] The burden placed on the defendant by chancery attachment is compounded by the long delay before a trial on the merits of the underlying claim.[31]

Despite the harshness of the remedy, Mississippi's attachment in chancery statutes did not meet with serious constitutional challenge[32] until *Mississippi Chemical Corp. v. Chemical Construction Corp.*[33]

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[28] Burt v. Roberts, 212 Miss. 576, 579, 55 So. 2d 164, 165 (1951) (chancellor is without authority to award damages to attachment defendant); Rosenbaum's Sons, Inc. v. Davis & Andrews Co., 111 Miss. 278, 282, 71 So. 388, 390 (1916) (damages and attorneys' fees can be recovered by attachment defendant only in a separate action for malicious prosecution based upon a decree terminating attachment in defendant's favor); Bonds v. L. Garvey & Co., 87 Miss. 335, 337, 39 So. 492, 493 (1905) (no statutory provision for an award of attorneys' fees or damages to attachment defendant).

[29] Hart v. Livermore Foundry & Mach. Co., 72 Miss. 809, 832, 17 So. 769, 775 (1895) (property remains in custodia legis until attachment is discharged by the debtor); *see* V. GRIFFITH, *supra* note 2, § 487, at 495 n.29.

[30] MISS. CODE ANN. § 11-31-9 (1972).

[31] MPI, Inc. v. McCullough, 463 F. Supp. 889, 897 (N.D. Miss. 1978). In the chancery court case, MPI's property was attached and its resident agent was personally served with process on November 17, 1978. Summons was made returnable before the chancery court to plead, answer, or demur to the bill of complaint on the fourth Monday of November, 1978, the first day of the return term. The case was to become triable at the convening of the next regular term of the chancery court, in this instance, the fourth Monday of February, 1979. Thus, MPI's property would have been burdened by attachment for no less than 100 days before the case became triable unless MPI chose to dissolve the attachment by posting the required bond. *Id.*; *see* MISS. CODE ANN. § 11-5-17 (1972).

[32] The due process issue with regard to chancery attachment was first brought to the attention of the Mississippi Supreme Court in 1930 but was summarily dismissed. Clark v. Louisville & Nashville R.R., 158 Miss. 287, 309, 130 So. 302, 309 (1930). Similarly, the issue was sidestepped in Louisville & Nashville R.R. v. Hasty, 360 So. 2d 925, 926 n.1 (Miss. 1978), since it had not been briefed on appeal. It is interesting to note that the latter case was decided just eight months after a federal district court had declared the chancery attachment procedure unconstitutional in Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 935-36 (S.D. Miss. 1977). See note 33 *infra*. The Fifth Circuit also declined comment on the constitutionality of the statutes in Steele v. G.D. Searle & Co., 483 F.2d 339 (5th Cir. 1973), *noted in* 45 MISS. L.J. 267 (1974), since the issue had not been addressed by the district court and had not been raised on appeal. 483 F.2d at 342 n.7.

[33] 444 F. Supp. 925 (S.D. Miss. 1977). Mississippi Chemical sued Chemico, a Delaware corporation qualified to do business in Mississippi, for some $25,000,000 and utilized Mississippi's chancery attachment procedure, made applicable to the federal court action by FED. R. CIV. P. 64, to attach substantial sums owed by certain corporations to Chemico. Chemico challenged the constitutionality of the procedure on the grounds that it failed to provide a defendant with prior notice or opportunity for a hearing, as well as other safeguards designed to prevent deprivation of property without due process of law. 444 F.

Moreover, despite early decisions holding that a person could not be dispossessed of his property without notice or opportunity to be heard,[34] the United States Supreme Court consistently upheld the validity of prejudgment remedies in the first half of this century.[35]

In *Sniadach v. Family Finance Corp.*[36] the Supreme Court finally held a prejudgment remedy unconstitutional. The *Sniadach* opinion invalidated a Wisconsin statute that permitted a prejudgment garnishment of a debtor's wages without prior notice or opportunity for the debtor to defend.[37] Emphasizing the particular hardships caused by wage garnishment,[38] the Court held the Wisconsin statute unconstitutional under the due process clause of the fourteenth amendment.[39] The Court limited its decision by noting that summary procedures might satisfy due process requirements in "extraordinary situations" that

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Supp. at 928. Unlike MPI, Chemico did not seek an injunction restraining operation of the chancery attachment procedure; rather, it sought only a declaration that the statutes were unconstitutional. 444 F. Supp. at 929.

[34] *See* Windsor v. McVeigh, 93 U.S. 274, 277 (1876) (a court may not pass sentence confiscating a person's property without first affording him notice and an opportunity to be heard); Ray v. Norseworthy, 90 U.S. (23 Wall.) 128, 135-36 (1874) (mortgage cannot be cancelled without affording notice or opportunity for hearing to the party to be affected); Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863)(prior to ratification of the fourteenth amendment—parties whose rights are to be affected are entitled to notice and an opportunity to be heard).

[35] *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-600 (1950) (federal statute that denied hearing prior to seizure of mislabeled drugs did not violate due process); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) (mere delay in judicial determination of property rights does not deny due process); Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 30-31 (1928) (attachment to avoid immediate harm of bank failure); Ownbey v. Morgan, 256 U.S. 94, 100 (1921) (foreign attachment procedure); McInnes v. McKay, 127 Me. 110, 141 A. 699, 702 (1928) (summary attachment of real estate and corporate stock in satisfaction of indebtedness), *aff'd per curiam*, 279 U.S. 820 (1929). The consensus of these opinions was that prejudgment seizures of property were only temporary deprivations of property and did not implicate the protections provided by due process requirements.

Prejudgment remedies in addition to attachment include garnishment, sequestration, and replevin. In each, a writ is usually issued and executed under state statutory authority by the seizing of the assets of the debtor-defendant and holding them until settlement of the underlying claim. *See* Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 359, 365 (1973).

[36] 395 U.S. 337 (1969), *noted in* 35 MO. L. REV. 405 (1970). *See generally* Hawkland, *The Seed of Sniadach: Flower or Weed?*, 78 COM. L.J. 245 (1973); Comment, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970).

[37] 395 U.S. at 338-39. The statute permitted a creditor to freeze, by a clerk's order, one-half the wages due an employee. *Id.* at 388 nn.1 & 2. Only by posting bond could the employee obtain the release of his garnished wages. *Id.* at 338-39.

[38] *Id.* at 340-42.

[39] *Id.* at 342.

demanded special protection of creditors' rights.[40] One year later, the principles enunciated in *Sniadach* were found to be controlling in *Goldberg v. Kelly*.[41] In *Goldberg*, the Court held that the summary termination of a welfare recipient's benefits without prior notice or a pretermination hearing was unconstitutional under *Sniadach* due process requirements.[42]

Sniadach actually raised more questions than it answered; and *Goldberg* provided few, if any answers.[43] However, any notion that the two decisions had announced a special rule applying only to basic "necessities of life" such as wages and welfare benefits[44] was effectively dispelled by *Fuentes v. Shevin*.[45] *Fuentes* involved Florida and Pennsylvania replevin statutes that permitted repossession of goods sold under installment sales contracts without judicial supervision, prior notice, or prior hearing.[46] The Court rejected the narrow reading of *Sniadach*

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[40] *Id.* at 339 (citing Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-600 (1950) (seizure of mislabeled drugs)); Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 31 (1928) (attachment by creditors of defunct bank); Ownbey v. Morgan, 256 U.S. 94, 110-12 (1921) (foreign attachment).

[41] 397 U.S. 254 (1970), *noted in* 49 N.C.L. Rev. 763. *See generally The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 100 (1970).

[42] 397 U.S. at 261. The New York procedure provided for a post-termination hearing at which a recipient could challenge the termination, *id.* at 259 n.5, but the federal district court held that only a pretermination hearing would satisfy due process. Kelly v. Wyman, 294 F. Supp. 893, 901 (S.D.N.Y. 1968) (due process requires adequate hearing before termination of welfare benefits).

[43] Clark & Landers, *supra* note 35, at 357-58. Some of the questions left unanswered by the case included: (1) whether *Sniadach* represented a broad indictment of all summary creditor remedies or whether the case had merely placed wages in a specially protected class; (2) what type hearing *Sniadach* had contemplated; and (3) the specifications for situations that would escape the *Sniadach* requirements under the "extraordinary situations" doctrine. *Id.*

[44] *See* Epps v. Cortese, 326 F. Supp. 127, 133-34 (E.D. Pa. 1971) (three-judge court) (*Sniadach* and *Goldberg* did not declare all provisional remedies regarding seizure of property unconstitutional), *rev'd sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971) (*Sniadach* principles did not apply to attachment of real property but only to garnishment of wages); Fuentes v. Faircloth, 317 F. Supp. 954, 958 (S.D. Fla. 1970) (three-judge court) (*Sniadach* and *Goldberg* involved special types of property and did not affect the validity of prejudgment seizure of goods without notice or hearing), *rev'd sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68, 70 (1969) (*Sniadach* was limited to garnishment of wages). *See also* Hawkland, *supra* note 36, at 248-49.

[45] 407 U.S. 67 (1972) (4-3 decision), *noted in* 86 Harv. L. Rev. 85 (1972); 40 U. Chi. L. Rev. 206 (1972); *see* Clark & Landers, *supra* note 35, at 359-62; Hawkland, *supra* note 36, at 249-53; *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 43, 71-85 (1974).

[46] 407 U.S. at 69-70. Under the challenged statutes, creditors were not required to show beyond mere conclusory allegations that they were entitled to the goods sought to be replevied. They only had to post security with a court clerk who would then issue a

and *Goldberg* that due process requirements could be limited to certain kinds of property[47] and held that the Florida and Pennsylvania statutes were repugnant to the fourteenth amendment.[48] The Court added that the fourteenth amendment extended protection to any significant property interest[49] and that a mere possessory interest in goods was sufficient to invoke the protection of the due process clause.[50] Finally, the Court formulated a test for "extraordinary situations" that might justify postponement of procedural safeguards.[51]

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writ of replevin. Although debtors could obtain release of the property by posting bond, they were not entitled to prior notice or hearing. The Florida statute provided for a postseizure hearing, but the Pennsylvania statute did not. *Id.* at 73-78.

[47] *Sniadach* and *Goldberg* were interpreted as being within the mainstream of previous decisions requiring notice and an opportunity to be heard before any property was seized. *Id.* at 88-89. The Court also explained that the requirements of notice and hearing raised no insurmountable barrier to the recovery of debts. On the other hand, the requirements guaranteed a fair process of decision-making that would work against arbitrary deprivations of property. *Id.* at 81.

[48] *Id.* at 96.

[49] *Id.* at 86 (citing Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971) (root requirement of due process is that a person must be given notice and an opportunity to be heard before he can be deprived of any significant property interest)).

[50] 407 U.S. at 86-87. The theory that the bare use of property is a protected interest was developed by Justice Harlan in his concurring opinion in Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring). Justice Harlan stated that deprivation of the use of garnished wages during the interim between garnishment and culmination of the main action could not be regarded as de minimis. 395 U.S. at 342.

[51] 407 U.S. at 90-91. The court stated:

> First . . . the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third . . . the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. Thus, the Court has allowed summary seizure of property only in limited situations. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950) (to protect the public from misbranded drugs); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (to protect against bank failure); Phillips v. Commissioner, 283 U.S. 589, 597 (1931) (to collect the internal revenue of the United States); United States v. Pfitsch, 256 U.S. 547, 549-50 (1921) (to meet the needs of a national war); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 320 (1908) (to protect the public from contaminated food).

The Court contemplated the "extraordinary situations" exception in Boddie v. Connecticut, 401 U.S. 371, 379 (1971), when it recognized that no person could be deprived of property without a hearing except in extraordinary situations where some valid governmental interest was at stake that justified postponement of the hearing until after the event.

The *Fuentes* "extraordinary situations" exception was recognized by the United States District Court for the Northern District of Mississippi in Holladay v. Roberts, 425 F. Supp. 61 (N.D. Miss. 1977). The court held that seizure of automobiles used in connection with violations of state alcoholic beverage control laws constituted an extraordi-

Two years later the Court in *Mitchell v. W. T. Grant Co.*[52] appeared to retreat from its earlier decisions. The *Mitchell* decision upheld Louisiana's sequestration statute even though it allowed a creditor to obtain a sequestration order without a prior hearing.[53] The Court determined that the statute provided other debtor safeguards sufficient to satisfy due process requirements. Under the Louisiana statute a creditor could obtain a writ of sequestration from a state court judge or from a court clerk whose function was more than ministerial only after posting a bond and filing an affidavit clearly showing the grounds justifying the order. The debtor was entitled to an immediate postseizure hearing at which the burden of sustaining the order was upon the creditor. If the creditor failed to satisfy this burden, the sequestration order was lifted and the debtor was entitled to damages and attorneys' fees.[54]

Although some commentators initially viewed the *Mitchell* decision as possibly undermining *Fuentes*,[55] *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[56] clearly reaffirmed the principles espoused in *Fuentes*. In contrast to *Mitchell*, *North Georgia Finishing* invalidated a Georgia procedure that authorized without judicial participation the issuance of a writ of garnishment against a debtor's bank account upon the mere conclusory allegations of a creditor.[57] Rejecting the Georgia Supreme

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nary situation contemplated by *Fuentes*. Nevertheless, the court stated, a hearing must be afforded at an early postseizure date. *Id.* at 65.

[52] 416 U.S. 600 (1974), *noted in* 35 La. L. Rev. 221 (1974); 49 Tul. L. Rev. 467 (1975).

[53] The Louisiana statute, like the Florida and Pennsylvania statutes in *Fuentes*, permitted a seller of goods under an installment contract to obtain a writ of sequestration to recover possession of the goods upon the buyer's default in the payment of the balance of the purchase price. 416 U.S. at 601.

[54] 416 U.S. at 605-07. In *Mitchell* the Court reasoned that since the creditor had a vested interest (a vendor's lien) in the goods sought to be repossessed, and since those goods would have continued to deteriorate through use by the buyer, the creditor was entitled to a prompt remedy. *Id.* at 607-09. The Court further explained that *Sniadach* was easily distinguishable since the creditor in that case had no vested interest in his debtor's wages and since the Wisconsin statute failed to provide adequate protection for the debtor. Although the creditors in *Fuentes* possessed a vested interest in the goods they sought to replevy, the statutes in question lacked the saving qualities of the Louisiana sequestration statute. *Id.* at 615-16.

[55] In his concurrence in *Mitchell*, Justice Powell remarked that *Mitchell* represented a significant withdrawal from the full reach of *Fuentes*. He felt it safe to conclude that *Fuentes* had been overruled. Mitchell v. W.T. Grant Co., 416 U.S. 600, 623 (1974) (Powell, J., concurring). Likewise, Justice Stewart was led to conclude in his dissent that *Mitchell* was a veritable reversal of *Fuentes*. Mitchell v. W.T. Grant Co., 416 U.S. 600, 634 (1974) (Stewart, J., dissenting). Neither justice felt that the two cases were constitutionally distinguishable. 416 U.S. at 623, 634. *See also* Anderson & Guidry, *Mitchell v. W.T. Grant Co.: Recognition of Creditors' Rights*, 80 Com. L.J. 63 (1975).

[56] 419 U.S. 601 (1975), *noted in* 46 Miss. L.J. 1104 (1975).

[57] 419 U.S. at 602-03. The statutes made no provision for prior notice or prompt

Court's narrow reading of the *Sniadach* and *Fuentes* decisions,[58] the Court held that due process procedural requirements do not distinguish among different kinds of property.[59] The Court easily distinguished *Mitchell* since the Georgia garnishment statute lacked all of the saving characteristics present in the Louisiana sequestration statute.[60]

The procedural guidelines set down in *Fuentes*, *Mitchell*, and *North Georgia Finishing* formed the basis of the federal district court's decision in *Mississippi Chemical Corp. v. Chemical Construction Corp.*[61] that Mississippi's chancery attachment statutes were unconstitutional.[62] In *Mississippi Chemical*, the court determined that the Mississippi chancery attachment procedure afforded a defendant neither prior notice nor the opportunity to contest the validity of the attachment either before or after its imposition.[63] Noting that the statutes failed to provide for any judicial review of the propriety of the attachment either before or after its imposition, the court concluded that the chancery attachment statutes totally abdicated effective judicial control of the procedure.[64] Accordingly, the court held that Mississippi's chancery attachment procedure failed to satisfy even minimal stan-

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hearing, and the only way a defendant could attack the garnishment was by posting bond equal to twice the amount alleged to be due to protect the creditor against loss or damage in the event the debtor failed to prevail at trial. *Id.* at 607.

[58] North Georgia Finishing, Inc. v. Di-Chem, Inc., 231 Ga. 260, 264, 201 S.E.2d 321, 323 (1973), *rev'd*, 419 U.S. 601 (1975). The Georgia Supreme Court, in rejecting the constitutional challenge, failed to take account of the *Fuentes* decision and held that *Sniadach* had done no more than to carve out an exception in favor of wage earners. 201 S.E.2d at 323.

[59] 419 U.S. at 608. The Court stated in *North Georgia Finishing* that they were no more inclined to distinguish among different kinds of property than they had been in the past. *Id.*

[60] *Id.* at 606-07.

[61] Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 938 (S.D. Miss. 1977). See note 33 and accompanying text *supra*.

[62] The court stated that "a comparison of the provisions of the Mississippi chancery attachment statutes with the teachings of *Fuentes* . . . *Mitchell* . . . and *North Georgia Finishing* . . . can lead to only one conclusion—the Mississippi attachment in chancery statutes are unconstitutional, both on their face and as applied herein." *Id.* at 936.

[63] *Id.* at 932-33. Simply by the service of summonses and complaints upon attachment defendants, the plaintiff was able to freeze substantial sums of money due and owing to the principal defendant. The plaintiff was not required to post bond or to show by affidavit or otherwise that he was entitled to the attachments. Moreover, the defendant could obtain release of his property only by posting satisfactory bond or by prevailing at the trial on the merits. *Id.*

[64] *Id.* at 938. The chancery attachment statutes may be invoked at the "sole and unreviewable discretion of the plaintiff's attorney . . . even in cases . . . where there is neither the need for swift action nor a foreign debtor who truly may not otherwise be subjected to the state court's jurisdiction." *Id.*

[65] *Id.* The Mississippi statutes do not even provide the minimal safeguards provided

dards of due process.[65] Although *Mississippi Chemical* involved only attachment of choses in action, the court observed that several federal district courts have held that state procedures authorizing prejudgment attachment of a defendant's real estate without notice or hearing were repugnant to due process requirements.[66]

Beyond a summary affirmance of a federal district court decision in *Spielman-Fond, Inc. v. Hanson's, Inc.*, however, none of the Supreme Court's decisions have involved attachments of real estate.[67] *Spielman-Fond* involved the constitutionality of Arizona's mechanics' and materialmen's lien statutes.[68] Although the statutes failed to provide defendants with prior notice or hearing, the federal district court observed that imposition of liens under the Arizona statutes did not dispossess defendants of their real estate; furthermore, the statutes contained no prohibition on alienation.[69] The court's conclusion was that the Arizona scheme did not amount to a significant deprivation of

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under the Florida and Pennsylvania statutes struck in *Fuentes*. *See id.* at 935.

Mississippi Chemical's alternative motion for attachment of funds at law under MISS. CODE ANN. §§ 11-33-1 to -107 (1972) was likewise denied. The court declared that although the attachment at law statutes provided some safeguards for an attachment defendant, they failed to satisfy the due process requirements of prior notice, opportunity for hearing, and judicial supervision. 444 F. Supp. at 939-42 (alternative holding).

[66] 444 F. Supp. at 933-34; *see* Terranova v. AVCO Fin. Serv. of Barre, Inc., 396 F. Supp. 1402, 1407 (D. Vt. 1975) (three-judge court) (emphasizing the necessity for judicial participation, prior notice, and hearing in connection with the granting of any prejudgment remedy including attachment of real estate); Bay State Harness Horse R. & B. Ass'n v. PPG Indus., Inc., 365 F. Supp. 1299, 1305-06 (D. Mass. 1973) (three-judge court) (statutes authorizing prejudgment attachment of real estate without prior notice or hearing were defective under the due process clause); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085, 1089-90 (D. Me. 1973) (three-judge court) (due process prohibits any significant deprivation of property and restriction of an owner's right to alienate his real estate is such a deprivation); Clement v. Four N. State St. Corp., 360 F. Supp. 933, 934-35 (D.N.H. 1973) (three-judge court) (attachment of real estate without notice or opportunity for hearing was unconstitutional). *But see* Central Sec. Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. 476, 482 (E.D. Mich. 1974) (attachment of real estate places only a limited restriction on ownership rights and does not amount to significant deprivation of property within the meaning of *Fuentes*); Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327, 1329-31 (1972) (Arizona Supreme Court did not consider itself bound by the four-judge majority of *Fuentes* and held that *Sniadach* was limited to garnishment of wages). The decision in the latter case caused one commentator to quip that such "frontier jurisprudence" was not worthy of consideration. Clark & Landers, *supra* note 35, at 359 n.15.

[67] 379 F. Supp. 997 (D. Ariz. 1973) (three-judge court), *aff'd mem.*, 417 U.S. 901 (1974).

[68] 379 F. Supp. at 997.

[69] The court reasoned that although a purchaser may be difficult to find, if a willing buyer presented himself there was nothing in the statutes prohibiting consummation of the transaction. In the court's opinion, the right to alienate had not been harmed. *Id.* at 998-99.

ownership rights sufficient to invoke due process protections.[70]

Applying the *Fuentes* "extraordinary situations" test,[71] several federal district courts have held that summary attachments of property belonging to nonresidents for purposes of securing jurisdiction did not violate due process.[72] Each of these decisions involved narrowly drawn statutes that provided debtors with sufficient safeguards to protect themselves against wrongful attachment.[73] The decisions also emphasized the importance of balancing the state's interest in securing jurisdiction over the matter with the interests of the debtor and creditor.[74] In *Jonnet v. Dollar Savings Bank*,[75] however, Pennsylvania's foreign attachment statutes failed to pass muster under the "extraordinary situations" test. In *Jonnet* the federal district court observed that in addition to failing to provide prior notice or opportunity for a hearing, the statutes clearly failed to demonstrate an overriding public interest in the attachment, the need for prompt action or effective judicial participation in the procedure.[76] *Jonnet* also questioned the propriety of

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[70] *Id. Spielman-Fond* formed one basis of authority in a Ninth Circuit decision sustaining Washington's attachment statutes. The decision appears, however, to turn more on *Mitchell*. The Washington procedure, like the one sustained in *Mitchell*, provided for an immediate postseizure hearing at which the creditor must demonstrate the propriety of the attachment. Matter of Northwest Homes of Chehalis, Inc., 526 F.2d 505, 506-07 (9th Cir. 1975), *cert. denied sub nom.* Hansen v. Weyerhaeuser Co., 425 U.S. 907 (1976); *see* B & P Dev. v. Walker, 420 F. Supp. 704, 705 (W.D. Pa. 1976) (court considered itself bound by the summary affirmance in *Spielman-Fond* in upholding the constitutionality of Pennsylvania's mechanics' lien law).

[71] See note 51 *supra*.

[72] *See* Merill Lynch Gov't Sec., Inc. v. Fidelity Mut. Sav. Bank, 396 F. Supp. 318, 320 (S.D.N.Y. 1975) (attachment of bank account to secure quasi in rem jurisdiction where defendant was resisting personal service); Hutchison v. Bank of North Carolina, 392 F. Supp. 888, 894-95 (M.D.N.C. 1975) (three-judge court) (attachment of real property where necessary to secure quasi in rem jurisdiction); Maxwell v. Hixson, 383 F. Supp. 320, 322-23 (E.D. Tenn. 1974) (three-judge court) (judicial attachments issued only after official certification of inability to serve defendant personally with process), *aff'd mem.*, 425 U.S. 927 (1976).

[73] See note 72 *supra*.

[74] See note 72 *supra*. *Cf.* Ownbey v. Morgan, 256 U.S. 94, 104 (1921) (the division of the country into many states each of which exercises its own jurisdiction, the universal extension of credit, and the freedom of mobility that citizens enjoy tend to lend importance to the remedy of foreign attachment). The *Ownbey* decision was cited in *Fuentes* as one of the cases where the Supreme Court had allowed postponement of procedural rights under the "extraordinary situations" exception. 407 U.S. at 91 n.23.

[75] 392 F. Supp. 1385 (W.D. Pa. 1975), *aff'd*, 530 F.2d 1123 (3d Cir. 1976).

[76] 392 F. Supp. at 1392-93. The court also noted that the statute was significantly overbroad and that the defendants could have been subjected to personal jurisdiction under the state's long-arm statute. *Id.* at 1392; *see* Aaron Ferer & Sons Co. v. Berman, 431 F. Supp. 847, 853 (D. Neb. 1977) (foreign attachment to secure quasi in rem jurisdiction on conclusory affidavit without bond or adequate judicial participation is unconstitutional).

state court jurisdiction based solely on the presence of property within the state where the cause of action bore no significant relationship to that property.[77] Two years later, the United States Supreme Court declared in *Shaffer v. Heitner*[78] that the presence of property in the state alone would not support state court jurisdiction where the property was wholly unrelated to the cause of action.[79] The Court held that although ownership of property might indicate the existence of other ties with the state, minimal contacts must be present to confer in rem or quasi in rem jurisdiction over a foreign defendant.[80]

In the instant case the court observed that since Mississippi's chancery attachment statutes could be invoked at the total discretion of a

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The statutes invalidated in the *Jonnet* and *Berman* decisions are significantly analogous to Mississippi's chancery attachment statutes. In fact, both decisions were cited with approval, along with *Mississippi Chemical*, by the Fifth Circuit in Johnson v. American Credit Co., 581 F.2d 526, 534 n.16 (5th Cir. 1978), which held Georgia's prejudgment attachment scheme unconstitutional for failing to provide adequate judicial supervision.

[77] 392 F. Supp. at 1392.

[78] 433 U.S. 186 (1977). *See generally* L. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33 (1978); *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1 (1977); Comment, *Shaffer v. Heitner: The Supreme Court Establishes a Uniform Approach to State Court Jurisdiction*, 35 Wash. & Lee L. Rev. 131 (1978).

[79] 433 U.S. at 208-09. In his majority opinion, Justice Marshall cited the *Jonnet* decision as a "well reasoned lower court opinion" that had "questioned the ancient proposition that the presence of property in a state gives that state jurisdiction to adjudicate rights to the property regardless of the relationship of the underlying dispute and the property owner to the forum." *Id.* at 205. *But cf.* National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977); Wilkerson v. Fortuna Corp., 554 F.2d 745 (5th Cir.), *cert. denied*, 434 U.S. 939 (1977). In *National Geographic*, the Court sustained the imposition of state use tax collection liability on National Geographic's mail order sales to California residents despite the fact that the only offices maintained by National Geographic in California were engaged entirely in soliciting advertisements for the society's magazine and were in no way involved in the society's mail order business. 430 U.S. at 559-61. The test, the Court concluded, is not whether the duty to collect the tax relates to National Geographic's activities carried on within California, but simply whether some minimum connection exists between the taxing state and the entity sought to be taxed. *Id.* at 561. In *Wilkerson*, the Fifth Circuit held that a New Mexico race track located on the Texas border that advertised extensively in Texas and received its revenue primarily from its Texas clientele was "doing business" in Texas within the meaning of the Texas long arm statute. 554 F.2d at 748.

[80] 433 U.S. at 209. *Shaffer* announced that all assertions of state court jurisdiction must ascribe to the minimal contacts rule, thus extending the "fair play and substantial justice" standards of International Shoe v. Washington, 326 U.S. 310 (1945) to in rem and quasi in rem jurisdiction. 433 U.S. at 209. *International Shoe* rejected the rule that a defendant had to be "present" in the forum state to give the state in personam jurisdiction, requiring instead that a defendant have "minimum contacts" with the forum state as a prerequisite to the state's assertion of in personam jurisdiction. The decision also demanded that all assertions of in personam jurisdiction must ascribe to notions of "fair play and substantial justice." 326 U.S. at 316.

private party and carried out by ministerial agents unassisted by responsible judicial authority without prior notice or opportunity to be heard, the statutes were repugnant to the due process clause.[81] The court reasoned that since the encumbering of realty during an attachment restricts the right of alienation, interferes with the ability to secure necessary financing for the enjoyment of the property, creates a cloud on the owner's title, and reflects upon the owner's credit in the business community, attachment of real property is a substantial deprivation of property sufficient to invoke procedural due process requirements.[82] The court noted that since MPI remained suable in state courts as a nonresident corporation authorized to do business in Mississippi,[83] the state had no interest in attachment of MPI's property as a means of securing jurisdiction, especially where the property was wholly unrelated to the underlying cause of action.[84] The court concluded that since none of the elements essential to support an "extraordinary situation" were written into the statutes or existed in the plaintiff's claim[85] and since the statutes failed to provide for a prompt postseizure hearing even in unusual circumstances,[86] the statutes were unconstitutional both on their face and as applied.[87]

Considering *Sniadach*[88] and its progeny, the decision in the instant case is no doubt correct. *Sniadach* implied and *Fuentes*[89] confirmed that the fourteenth amendment contemplates protection of any significant

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[81] MPI, Inc. v. McCullough, 463 F. Supp. 887, 895-96, 899 (N.D. Miss. 1978).

[82] *Id.* at 899.

[83] *Id.* at 902.

[84] *Id.* at 893-94.

[85] *Id.* at 896. Specifically, the court held that there was no public or governmental interest such as securing jurisdiction over a res where no other means of acquiring jurisdiction existed, the statutes were not aimed at meeting any special need for prompt action, and the procedure was neither initiated nor monitored by responsible judicial authority. *Id.* at 896-97. See note 51 *supra*.

[86] 463 F. Supp. at 897.

[87] *Id.* at 900. Satisfied that MPI had demonstrated a substantial likelihood that it would prevail at a trial on the merits, that it would suffer irreparable harm if an injunction were not issued, that the threatened injury to MPI outweighed whatever damage might result to the opposition if an injunction were issued and that issuance of an injunction was not adverse to the state's interest, the court issued a preliminary injunction restraining enforcement of the chancery attachment procedure without otherwise interfering with the state court action. *Id.* at 902. The Fifth Circuit demands that each of the above elements be satisfied before a preliminary injunction may issue. Hardin v. Houston Chronicle Pub. Co., 572 F.2d 1106, 1107 (5th Cir. 1978).

[88] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). See notes 36 through 40 and accompanying text *supra*.

[89] Fuentes v. Shevin, 407 U.S. 67 (1972). See notes 45 through 51 and accompanying text *supra*.

real or personal property right.[90] *Mitchell*[91] did nothing to diminish the importance of *Fuentes;* the cases are readily distinguishable.[92] *North Georgia Finishing*[93] reaffirmed *Fuentes* by indicating that only where *Mitchell*-type safeguards exist can the requirements of prior notice and hearing be obviated. The instant case emphasized that none of the provisions deemed sufficient in *Mitchell*[94] were present in the Mississippi chancery attachment statutes.

The Mississippi statutes are also easily distinguishable from the Arizona statutes upheld in *Spielman-Fond*.[95] Unlike the Arizona statutes, the Mississippi chancery attachment mechanism creates more than a nonpossessory lien. The procedure transfers the attached real or personal property to the constructive possession of the chancery court where it is held until release is secured by the owner's bond or until the nonresident prevails at a trial on the merits.[96]

State court jurisdiction was not at issue in the instant case since the decision did not question the chancery court's jurisdiction over MPI. In fact, the court emphasized that nonresident corporations are suable in state courts.[97] In light of the United States Supreme Court's decision in *Shaffer v. Heitner*,[98] the jurisdictional issue is of paramount importance when considering the chancery statues. Conceivably, under the present statutes, cases could arise where the chancery court's only basis of jurisdiction is the presence of a defendant's property within the state, and, as in the instant case, where the plaintiff's claim bears no relation whatsoever to the property. Under *Shaffer*, state court jurisdiction will not lie unless the nonresident defendant maintains at least "minimum contacts" with the state.[99]

Where the state has a valid interest in adjudicating the claim,

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[90] 407 U.S. at 86.

[91] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). See notes 52 & 53 and 55 & 56 and accompanying text *supra*.

[92] The statute in question in *Mitchell* was more narrowly drawn than the one in *Fuentes*, and was applicable only where there was a clear showing of impending concealment or waste upon the property. 416 U.S. at 605. In *Fuentes*, however, the statute was too broadly based and did not limit the summary remedy to special situations demanding prompt action. 407 U.S. at 94.

[93] North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). See notes 54 and 56 through 60 and accompanying text *supra*.

[94] See note 56 *supra*.

[95] Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973) (three-judge court), *aff'd mem.*, 417 U.S. 901 (1974). See notes 67 through 69 and accompanying text *supra*.

[96] *See* MPI, Inc. v. McCullough, 463 F. Supp. 887, 898 (N.D. Miss. 1978).

[97] *Id.* at 902.

[98] 433 U.S. 186 (1977). See notes 78 through 80 and accompanying text *supra*.

[99] 433 U.S. at 208-09. See note 80 and accompanying text *supra*.

however, and where the nonresident is avoiding or is not otherwise amenable to the chancery court's jurisdiction, it seems reasonable to allow attachment to secure jurisdiction over the controversy. Such cases would qualify under the *Fuentes* "extraordinary situation" exception obviating the necessity of prior notice and hearing.[100] In fact, several courts have held that where attachment is necessary to secure jurisdiction over a nonresident who is avoiding service of process, procedural due process does not require prior notice or hearing.[101]

Attachment also seems legitimate where it becomes necessary to prevent defendants from concealing or depleting assets that might otherwise be available to satisfy the claims of creditors. But where a nonresident such as a corporation licensed to do business in the state is amenable to personal service and judgment, the added step of attachment is redundant.[102] Once personal jurisdiction is obtained, there is no state or creditor interest that justifies continuation of the attachment unless some extraordinary situation exists.[103]

The decision in the instant case demands protection of debtors' rights and makes clear that arbitrary attachments of property will not be tolerated. It does not, however, diminish the ability of the well-meaning creditor to pursue his debtor. On the contrary, it provides suggestions for an effective legal framework that can be utilized by well-meaning creditors to satisfy their claims. Under a carefully and narrowly drawn statute that balances the interests of debtor and creditor with those of the state and implements the requirements of *Fuentes, Mitchell, North Georgia Finishing,* and *Shaffer*, effective adjudication of creditors' claims can be achieved.

Now that Mississippi's chancery attachment statutes have failed to survive constitutional attack in two federal district courts,[104] the legislature should redraft the statutes to provide for both adequate debtor safeguards and security for creditors' interests.[105] The Louisiana statutes

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[100] See note 51 *supra.*

[101] See note 72 *supra.*

[102] *See* Clark & Landers, *supra* note 35, at 367.

[103] *Id.* at 368.

[104] *E.g.*, MPI, Inc. v. McCullough, 463 F. Supp. 887 (N.D. Miss. 1978); Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925 (S.D. Miss. 1977).

[105] Mississippi's other prejudgment remedies include attachment at law, MISS. CODE ANN. §§ 11-33-1 to -107 (1972), sequestration, MISS. CODE ANN. §§ 11-29-1 to -13 (1972), and replevin, MISS. CODE ANN. §§ 11-37-101 to -157 (Supp. 1979). Although the attachment at law and sequestration statutes require a creditor to submit bond and an affidavit, they do not satisfy the requirements of prior notice and hearing and judicial participation. At present, neither of the statutes would survive constitutional attack. In fact, a federal district court has already determined that the attachment at law statutes are constitutionally deficient. Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 939-

upheld in *Mitchell* should provide some guidance.[106] A second approach that would bring the statutes within constitutional guidelines is that taken by the state of Washington. There the courts have given approval to a procedure wherein upon application to the court a creditor may obtain an order directing the defendant to show cause within eight days why a writ of attachment should not issue. The show-cause hearing, the

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42 (S.D. Miss. 1977) (alternative holding). See note 65 *supra*.

The present replevin statutes were enacted in 1975 in response to the Fifth Circuit's determination that the old replevin statutes, MISS. CODE ANN. §§ 11-37-1 to -57 (1972) (repealed 1975), were unconstitutional for failing to provide prior notice and opportunity for a hearing. Turner v. Colonial Fin. Corp., 467 F.2d 202, 202 (5th Cir. 1972) (per curiam). The new replevin statutes provide for judicial participation, factual showing of necessity, posting of bond by the creditor, and a postseizure hearing at the earliest possible date. Although the new statutes provide debtor safeguards seemingly adequate to satisfy due process requirements, some constitutional problems remain. For instance, the statutes still do not provide for prior notice, nor do they afford a debtor an opportunity for a hearing prior to issuance of the writ. In fact, the only hearing contemplated by the statutes is a trial on the merits which, according to the statutes, is to be treated with preference and "shall be heard on the merits at the earliest possible date." MISS. CODE ANN. § 11-37-145 (Supp. 1979). The Supreme Court has held that the requirements of prior notice and hearing may not be necessary where the statute provides for an immediate postseizure hearing where the burden is upon the creditor to prove the validity of his claim. Mitchell v. W.T. Grant Co., 416 U.S. 600, 605-07 (1974). It is doubtful, however, that a trial on the merits "at the earliest possible date" is the sort of immediate postseizure hearing contemplated by the Court in *Mitchell*. A second problem is presented by the provision that except by prevailing at a trial on the merits, the debtor may obtain the release of the seized property only by entering bond payable to the plaintiff in double the value of the property. MISS. CODE ANN. § 11-37-115 (Supp. 1979). Each of the statutes held unconstitutional in *Fuentes* and *North Georgia Finishing* contained similar provisions which the Court held were insufficient to satisfy due process. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975); Fuentes v. Shevin, 407 U.S. 67, 73-78 (1972). Still another problem is presented by the section providing for replevin without bond. MISS. CODE ANN. § 11-37-131 (Supp. 1979). Under the procedure, the property is not actually seized, but the defendant is subject to penalties of contempt if he moves, conveys, or otherwise disposes of the property. MISS. CODE ANN. § 11-37-137 (Supp. 1979). Although the statute requires judicial supervision, factual showing of necessity, and a trial on the merits at the earliest possible date, the procedure falls short of the requirements of prior notice and hearing in addition to its failure to provide the debtor with the protection of the creditor's bond. The validity of the statute is also called into question by the fact that it does not provide for an immediate postseizure hearing apart from a trial on the merits at the "earliest possible date." Although no property is actually seized prior to judgment, the procedure specifically restricts the right of the defendant to alienate the property in question. The Supreme Court has held that due process contemplates protection of any significant real or personal property right. Fuentes v. Shevin, 407 U.S. 67, 86 (1972). In applying *Fuentes* to the instant case, the federal district court held that a restriction on an owner's right of alienation is a significant deprivation of property in violation of due process. MPI, Inc. v. McCullough, 463 F. Supp. 887, 899 (N.D. Miss. 1978).

[106] *See* LA. CODE CIV. PRO. ANN. arts. 3501, 3504, 3506, 3507, 3508, 3510, 3511, 3574, 3576 (West). See notes 52 through 54 and accompanying text *supra*.

Washington court has ruled, satisfies the notice and hearing requirements of *Fuentes* and at the same time enables the judge to determine the validity of the attaching creditor's claim before any attachment can issue.[107]

In any event, any new attachment statutes should require judicial supervision, factual showing of necessity, and posting of bond by the plaintiff. In addition, they should demand either a prompt postseizure hearing or a show-cause hearing on the validity of the attachment. Some provision should also be made for those cases qualifying under the *Fuentes* "extraordinary situations" exception justifying the postponement of procedural requirements. The statutes should also contain some provision whereby nonresident qualified or domesticated corporations amenable to personal service of process cannot be subjected to chancery attachment except in the unusual situations outlined in *Fuentes*. Finally, in drafting the statutes the legislature should take care to incorporate the requirements of *Shaffer* to ensure that notions of "fair play and substantial justice" regarding state court jurisdiction over nonresident defendants are met.

Horace Mark Adams

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[107] Rogoski v. Hammond, 513 P.2d 285, 287-88 (Wash. App. 1973). The court observed that although the attachment statute, WASH. REV. CODE § 7.12.020 (1974), taken alone was unconstitutional on its face for failure to provide prior notice and hearing, the Washington legislature had provided under WASH. REV. CODE § 2.28.150 (1974) that where the course of procedure is not specifically provided for by statute, any suitable procedure may be employed that conforms to the "spirit of the law." The court held that WASH. REV. CODE § 2.28.150 (1974) was broad enough to encompass a show-cause hearing which, taken with WASH. REV. CODE § 7.12.020 (1974), brought the attachment procedure within due process guidelines.

CONSTITUTIONAL LAW—EQUAL PROTECTION—INTESTATE SUCCESSION STATUTE ALLOWING ILLEGITIMATE TO INHERIT FROM FATHER'S ESTATE EXCLUSIVELY BY ADJUDICATION OF PATERNITY IN FATHER'S LIFETIME IS CONSTITUTIONAL

Plaintiff,[1] an illegitimate,[2] petitioned the surrogate court for a compulsory accounting from the administratrix of his father's estate, contending that he was entitled to inherit as his father's child.[3] The New York intestate succession statute[4] prevented an illegitimate's inheriting on equal terms with a legitimate unless the illegitimate had secured a court order of filiation during the father's lifetime. Plaintiff maintained that this statutory scheme was violative of the equal protection clause of the fourteenth amendment.[5] The surrogate court accepted the administratix's contention that plaintiff was properly excluded from inheriting from his father's estate, and held the statute to be constitutional.[6] The New York Court of Appeals affirmed.[7] On writ of certiorari to the United

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[1] Robert Lalli was the alleged son of Mario Lalli, who died intestate on January 7, 1973, in New York. Plaintiff's mother never married Mario. Robert's sister, Maureen, also joined in the initial action. Lalli v. Lalli, 99 S. Ct. 518, 521 (1978).

[2] Professor Krause defines illegitimacy as follows:

> The definition of illegitimacy is tied to the parents' marital status at the time of their child's birth. It usually involves the fact that the child was "born out of wedlock and not legitimated," sometimes includes a reference to the time of conception to cover the child who was conceived before marriage or born after its termination, and excludes from legitimacy children born to a married mother in circumstances in which the husband could not have been the father.

H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 10-11 (1971).

[3] Plaintiff filed suit in the Surrogate's Court for Westchester County, New York, against Mario's widow Rosamand Lalli, who had been appointed administratrix of her husband's estate. 99 S. Ct. at 521.

[4] N.Y. EST., POWERS AND TRUST LAW § 4-1.2 (McKinney 1967) provides, in pertinent part:

> An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

[5] 99 S. Ct. at 522. Plaintiff admitted that he had not obtained an order of filiation during his alleged father's lifetime. Plaintiff did, however, offer into evidence a notarized consent-to-marry document in which his alleged father had identified plaintiff as "my son." Plaintiff also offered affidavits of persons who stated that the putative father had openly acknowledged plaintiff as one of his children. *Id.*

[6] *Id.*

[7] 38 N.Y.2d 77, 340 N.E.2d 721, 378 N.Y.S.2d 351 (1975). The plaintiff appealed the Court of Appeals' decision to the United States Supreme Court. Trimble v. Gordon, 430 U.S. 762 (1977) was decided while the instant case was pending and, because of similarity of issues, the Court vacated and remanded the present case in light of *Trimble.* Lalli v. Lalli, 431 U.S. 911 (1977). On remand the New York Court of Appeals affirmed its original

States Supreme Court, *held,* affirmed. An intestate succession statute conditioning an illegitimate's right to inherit from his father's estate upon the illegitimate's procuring a judicial order of filiation during the father's lifetime is not violative of the equal protection clause of the fourteenth amendment. *Lalli v. Lalli,* 99 S. Ct. 518 (1978).

Historically, illegitimates have been subjected to discriminatory treatment under the law.[8] Although Roman law recognized only limited rights of illegitimates, it did contain a procedure that provided illegitimates with an opportunity to secure rights equal to those of natural children.[9] The canon and civil law of the Middle Ages accorded illegitimates few rights[10] but, like their predecessors in Roman law, provided for legitimation in certain circumstances.[11] At early common law, the descent of property was governed by primogeniture whereby the eldest son inherited all property to the exclusion of legitimate and illegitimate children.[12] After primogeniture was abolished, illegitimates were denied inheritance rights at common law because of their classification as nullius filius—child of nobody.[13] This distinction was based upon civil policy designed to check immorality.[14] An illegitimate could only be made

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decision. *In re* Lalli, 43 N.Y.2d 65, 371 N.E.2d 481, 400 N.Y.S.2d 761 (1977). After distinguishing the statute in the instant case from the one in *Trimble,* the Court of Appeals concluded that the statute was substantially related to New York's interest in "the orderly settlement of estates and the dependability of titles to property passing under intestacy laws." *Id.* at 69-70, 371 N.E.2d at 483, 400 N.Y.S.2d at 763-64 (quoting Trimble v. Gordon, 430 U.S. at 771). The plaintiff again sought review in the United States Supreme Court, and, after noting probable jurisdiction, the Court granted a writ of certiorari. Lalli v. Lalli, 435 U.S. 921 (1978).

[8] H. CLARK, LAW OF DOMESTIC RELATIONS 155 (1968).

[9] Roman law recognized the illegitimate child's relationship to his mother but refused to concede the child's relationship to his father. H. KRAUSE, *supra* note 2, at 2-3. The Emperor Constantine radically changed the legal status of illegitimates by introducing the doctrine of legitimation by subsequent marriage. Legitimation by imperial decree and presentment to the curia were later incorporated into Roman law. *Id.* at 2 n.4.

[10] The canon law exercised a well-defined jurisdiction in the field of family law. As a result of the Church's opposition to extramarital relations, the bastard was treated as a person with few rights, a status shared with robbers and thieves. Comment, *The Familial Property Rights of Illegitimate Children: A Comparative Study,* 30 COLUM. L. REV. 308, 315 (1930).

[11] The civil and canon law provided for legitimation through the marriage of the parents after the birth of the child. Stenger, *The Supreme Court & Illegitimacy 1968-1977,* 11 FAM. L.Q. 365, 367 (1978).

[12] *Id.* at 369.

[13] The classification of bastards as nullius filius had the effect of denying them inheritance rights from both lineal and collateral relatives. I W. BLACKSTONE, COMMENTARIES 459.

[14] Blackstone was of the opinion that any distinction between legitimates and illegitimates except that of inheriting, which was necessary because of civil policy, would be unjust and cruel. *Id.* Although this common law approach to illegitimacy was rationalized

legitimate under the law through an act of Parliament.[15] Although the inheritance law of the American colonies did not attempt to provide for the intestate succession claims of illegitimates,[16] the harshness of the common law was eventually alleviated by statute in every American jurisdiction.[17] Of particular significance was the extension of the rights of illegitimates to inherit from their mothers.[18] Typical of this development in American jurisprudence is section 91-1-15 of the Mississippi Code, which specifies a procedure for legitimation, grants illegitimates the right to inherit from their mother and her kindred, and allows the mother of an illegitimate and her kindred to inherit from her child.[19] First enacted in a skeletal form in 1821, the law was amended three times before reaching its present status.[20] Though the act evinces the

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as an attempt to restrain immorality, it served only to punish the child for the sins of his parents. M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 20 (1970).

[15] I W. BLACKSTONE, COMMENTARIES 459.

[16] Early debate in American law concerning intestate succession centered upon the attempt to equalize the claims of all male children by rejecting primogeniture and entail. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 28 (1977).

[17] T. ATKINSON, LAW OF WILLS 82 (2nd ed. 1953).

[18] The common law rule of nullius filius was liberalized in most jurisdictions by laws providing for limited inheritance rights of the illegitimate through maternal ancestry. Note, *Trimble v. Gordon: An Unstated Reversal of Labine v. Vincent*, 5 PEPPERDINE L. REV. 609, 612-13 (1978); *see* Taylor v. Jackson, 194 Miss. 441, 452, 12 So. 2d 144, 147 (1943) (illegitimates may inherit from their mother and her kindred equally with legitimates).

[19] If any man beget a child or children by a woman whom he shall afterward marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be legitimate and capable in law to inherit and transmit inheritance as if born in wedlock. All illegitimates shall inherit from their mother, from her other children, and from her kindred, according to the statutes of descent and distribution; and the children of illegitimates and their descendants shall inherit from the brothers and sisters of their father or mother, whether legitimate or illegitimate, and from their grandparents. The children of illegitimates shall not inherit from any ancestor or collateral kindred if there be legitimate heirs of such ancestor or collateral kindred, in the same degree, to whom the estate would otherwise descend. The mother of an illegitimate, her other children, and her kindred, whether they be legitimate or illegitimate, shall inherit from an illegitimate according to the statutes of descent and distribution.

MISS. CODE ANN. § 91-1-15 (1972).

[20] The first provision of the present § 91-1-15 is found in article 3 of the Act of Wills, Hutchinson's Mississippi code of 1821. The second provision of the statute, modifying the common law by allowing the illegitimate to inherit from his mother, was enacted in article 15, chapter 60, of the code of 1857. The statute was further modified by the adoption of § 1955 of the revised code of 1871, which included the next two provisions of the act, and by the passage of chapter 162 of the Laws of 1924, which embodied the final provision of the statute. Malone v. Pope, 189 Miss. 46, 58-59, 196 So. 319, 332 (1940) (legitimate children may inherit from their illegitimate aunt through their illegitimate father).

modern trend of expanding the rights of illegitimates, it has repeatedly been construed strictly by the supreme court.[21] Many states have adopted a more liberal recognition of the rights of illegitimates than Mississippi;[22] most legislatures, however, have been criticized for their

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[21] *See* Rias v. Henderson, 342 So. 2d 737, 741 (Miss. 1977) (although statutory age limitations on child support which distinguish between legitimates and illegitimates are unconstitutional, this fact does not weaken the authority of the state to provide for the exclusion of illegitimates from inheriting property from their intestate natural fathers); Akers v. Estate of Johnson, 236 So. 2d 437, 440 (Miss. 1970) (statute construed to deny inheritance by an illegitimate from his paternal grandfather); Thomas v. Thomas, 200 Miss. 96, 101-02, 25 So. 2d 710, 710 (1946) (conditions precedent to legitimation are proof by clear and convincing evidence that the child is the natural child of her father, that both parents were later lawfully married and that the father acknowledged the child as his own); McDaniel v. McDaniel, 123 Miss. 401, 411, 85 So. 113, 113 (1920) (statute allows illegitimate children to inherit from their maternal uncle).

[22] Five states have adopted statutes similar to the Uniform Parentage Act, which provides that "[p]aternity may be established by marriage or attempted marriage, written acknowledgment, paternity or support adjudication, or receiving a minor child into one's home and holding him out as one's child." Stenger, *supra* note 11, at 395 (citing CAL. PROB. CODE § 255 (West Supp. 1978); CAL. CIVIL CODE § 7004 (West Supp. 1978); HAW. REV. STAT. §§ 584-586 (1976); N. D. CENT. CODE §§ 30.1-09(2), 14-17-04(1) (1976 & Supp. 1977); WASH. REV. CODE ANN. § 26.26.040 (Supp. 1978); WYO. STAT. § 14-2-102 (1978)).

Eight states have chosen to follow guidelines similar to those recommended in the Uniform Probate Code, which states that "[p]aternity may be established by marriage or attempted marriage, by adjudication before the father's death or by clear and convincing evidence thereafter." Stenger, *supra* note 11, at 395 (citing ALASKA STAT. § 13.11.045(B) (1972); ARIZ. REV. STAT. ANN. § 14-2109(2) (1975); DEL. CODE ANN. tit. 12, § 508 (Supp. 1978); IDAHO CODE § 15-2-109 (1979); MONT. REV. CODES ANN. § 72-2-213 (1978); NEB. REV. STAT. § 30-2309(2) (1975); S.D. COMPILED LAWS ANN. § 29-1-15 (1976); UTAH CODE ANN. § 75-2-109 (1978).

In nine other jurisdictions paternity may be established by either intermarriage, adjudication or written acknowledgment. CONN. GEN. STAT. ANN. § 45-274 (West Supp. 1978); D.C. CODE ENCYCL. § 19-316 (West Supp. 1978); FLA. STAT. ANN. § 732.108(2) (West Supp. 1979); IOWA CODE ANN. § 633.222 (West 1964); KAN. STAT. § 59-501 (1974); MD. EST. & TRUSTS CODE ANN. § 1-208 (1974); OKLA. STAT. ANN. § 45-274 (West Supp. 1978); OR. REV. STAT. § 112-105 (1977); VT. STAT. ANN. tit. 14, §§ 553, 554 (1974); WIS. STAT. ANN. § 852.05(1)(b) (West 1971); *see* Stenger, *supra* note 11, at 396; 32 ARK. L. REV. 120, 129-30 (1978) (tracing various states' paternity statutes).

Five more states provide for the establishment of paternity by the intermarriage of the parents or upon an adjudication of paternity. IND. CODE ANN. § 29-1-2-7 (Burns 1972); MASS. GEN. LAWS ANN. ch. 190, § 7 (West 1958); N.Y. EST., POWERS & TRUSTS § 4-1.2 (McKinney 1967); OHIO REV. CODE ANN. §§ 2105.17, .18 (Page Supp. 1978); TENN. CODE ANN. § 36-234, -307 (1977); *see* Stenger, *supra* note 11, at 396.

An additional six states will find paternity upon the intermarriage of the parents or an acknowledgment of the child by the father. ALA. CODE §§ 43-3-7, 26-11-1, -2 (1975); ME. REV. STAT. tit. 18, § 1003 (1965); MICH. COMP. LAWS ANN. § 702.83 (Supp. 1978); MINN. STAT. ANN. § 525.172 (West 1975); NEV. REV. STAT. § 134.170 (1973); TEX. PROB. CODE ANN. § 42 (Vernon Supp. 1978); *see* Stenger, *supra* note 11, at 396.

Mississippi and thirteen other states have the least progressive requirement for the

lack of progressive action in this area of the law.[23] Largely because of dissatisfaction with the development of state action to improve the rights of illegitimates, proponents of these rights turned from state legislation to the fourteenth amendment[24] in an effort to provide illegitimates with equal protection of the laws.[25]

Initially, the Supreme Court applied the equal protection clause solely to cases involving racial discrimination by the states.[26] Although the clause was rarely invoked in the first decades of its existence,[27] it has

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establishment of paternity. These states require that paternity be proven by intermarriage only. ARK. STAT. ANN. § 61-141 (1971); GA. CODE ANN. § 74-101 (1973); ILL. ANN. STAT. ch. 3, § 2-2 (Smith-Hurd Supp. 1978); LA. CIV. CODE ANN. art. 919 (1952) (father may acknowledge child who can inherit only to the exclusion of the state); MISS. CODE ANN. § 91-1-15 (1972); MO. ANN. STAT. § 474.070 (Vernon 1956); N.H. REV. STAT. ANN. §§ 561-564 (1974); N.J. STAT. ANN. §§ 3A:4-7 (West 1953) (declared unconstitutional in *In re* Estate of Sharp, 377 A.2d 730 (N.J. 1977)) (repealed by 1977 N.J. LAWS, c. 412, § 90); 20 PA. CONS. STAT. ANN. § 2107(b) (Purdon 1975); R.I. GEN. LAWS § 33-1-8 (1970); S.C. CODE § 20-1-60 (1977); VA. CODE § 64.1-.6 (1973) (repealed by 1978 VA. ACTS, c. 647) (statute replaced by VA. CODE § 20-31-1, which requires some semblance of a marriage for a child to be legitimate even though the marriage is not recognized under Virginia laws); W. VA. CODE § 42-1-6 (1966); *see* Stenger, *supra* note 11, at 396-97; 32 ARK. L. REV. 120, 128 (1978).

[23] Current intestacy laws, which often exclude or restrict illegitimates from inheritance, have been described as failures in promoting the welfare of the child or the state. Resteiner, *Illegitimates: Rights of Inheritance*, 57 MICH. ST. B.J. 354, 359-60 (1978). *See generally* Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 835-39 (1966); 69 MICH. L. REV. 112, 130 (1970).

[24] The equal protection clause of the fourteenth amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The fourteenth amendment's ratification in 1868 was due in large part to the fear of some congressmen that the Supreme Court would find particular Reconstruction acts to be beyond the scope of congressional power. Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1068 (1968).

[25] Because illegitimates had no lobby, typical state legislation concerning the status of illegitimates consisted of scattered provisions among the state's intestate succession, paternity and bastardy statutes. Prior to equal protection challenges to state statutes, state legislation and judicial decisions affecting illegitimates' rights were making only piecemeal progress. H. KRAUSE, *supra* note 2 at 6, 59.

[26] "[W]e doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (state's monopoly on slaughtering animals did not deny butchers not employed by the state-chartered company equal protection). *But see* Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C.L. REV. 1, 6-7 (1978) (suggesting that the framers of the equal protection clause were not exclusively concerned with racial discrimination, but also intended that other forms of discrimination be forbidden by the clause).

[27] Because the Court infrequently employed the equal protection clause, Justice Holmes, in Buck v. Bell, 274 U.S. 200, 208 (1927), viewed this clause as the "last resort of constitutional arguments" as the Court upheld the validity of a statute providing for sterilization of second generation feeble-minded inmates who have feeble-minded illegiti-

since been relied upon frequently by the Court and extended to numerous classifications other than race.[28] When faced with an equal protection challenge to a state's statutory classification, the Supreme Court's initial inquiry involves selection of the appropriate standard of review to be applied. First, the Court must determine if the legislation discriminates against a suspect class[29] or infringes upon a fundamental right.[30] If the Court finds discrimination against a suspect class or violation of a fundamental right, it applies the strict scrutiny test to determine whether the statute violates the equal protection clause. Under this test, a statute must meet the difficult standard[31] of being manifestly related

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mate children. Comment, *Illegitimacy and Equal Protection: Two Tiers or an Analytical Grab Bag?*, 7 LOY. CHI. L.J. 754, 756 (1976).

[28] *See* Comment, *Equal Protection in Transition: An Analysis and A Proposal*, 41 FORDHAM L. REV. 605, 605-11 (1973); Comment, *supra* note 24, at 1123-31.

[29] The Supreme Court has repeatedly held that race is a suspect classification. *See* Loving v. Virginia, 388 U.S. 1, 4-12 (1967) (statutory scheme prohibiting interracial marriage held violative of equal protection and due process); McLaughlin v. Florida, 379 U.S. 184, 184 (1964) (criminal statute that prohibited cohabitation of unmarried interracial couples violated equal protection); Brown v. Board of Education, 347 U.S. 483, 493-94 (1954) (racial segregation of children in public schools is unconstitutional denial of equal protection).

The "suspect" classification was later extended to include alienage. *See In re* Griffiths, 413 U.S. 717, 725 (1973) (state may not prohibit aliens from taking bar examination); Sugarman v. Dougall, 413 U.S. 634, 646 (1973) (state civil service may not discriminate against aliens in employment); Graham v. Richardson, 403 U.S. 365, 374-75 (1971) (state may not discriminate against aliens in distributing public assistance funds). *But see* Foley v. Connelie, 435 U.S. 291, 294-97 (1978) (New York law limiting appointment of members of state police force to U.S. citizens held constitutional).

Finally, the Supreme Court concluded that ancestry may be included among the suspect classifications under the fourteenth amendment's protective aegis. *See* Oyama v. California, 332 U.S. 633, 644-45 (1948) (citizens may not be deprived of property because their parents were aliens). *But see* Korematsu v. United States, 323 U.S. 214 (1944) (wartime order excluding all persons of Japanese ancestry from military areas held constitutional).

[30] Included among fundamental rights are the rights of criminal defendants, Williams v. Illinois, 399 U.S. 235 (1970), the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), and the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942).

For in-depth discussions of the equal protection clause, its application to suspect classes and its protection of fundamental rights, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1973); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

[31] The practical effect of applying the strict scrutiny test to equal protection cases has been the striking as unconstitutional of the legislative classification. In only one case, Korematsu v. United States, 323 U.S. 214 (1944), in which the Court upheld the exclusion of Japanese Americans from designated areas following the attack on Pearl Harbor, did the Court apply this test and uphold the classification. *Id.* at 219; *see* L. TRIBE, AMERICAN

to a compelling governmental interest.[32] If the statutory classification does not discriminate against a suspect class or violate a fundamental right, a less stringent level of review is used by the Court. The rational basis standard is the traditional level of review used in most equal protection cases.[33] Use of this permissive test provides the basis for upholding a statutory classification against an equal protection attack. If there are any facts that reasonably may be conceived to justify the classification, the statute survives rational basis review.[34]

The strict scrutiny and rational basis levels of review solidified into a two-tiered system of analysis for equal protection cases that was easily applied in extreme situations but created enormous tension in other, more complex cases where legislative motivations were not clear.[35] The

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CONSTITUTIONAL LAW 1000 (1978); Wills, *Paternity Statutes: Thwarting Equal Protection for Illegitimates,* 32 U. MIAMI L. REV. 339, 344 (1977).

[32] To pass the strict scrutiny test, a classification must be based on the sound belief that a compelling state interest is in fact the purpose underlying the statutory discrimination. 32 ARK. L. REV. 120, 121 (1978); *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 39 (1973) (strict scrutiny was not applicable to state's statutory system for financing public education by an ad valorem tax on property within each school district). The Court will invalidate a statutory classification under this level of review if alternative legislation that would further the state interest and yet be less burdensome to the disadvantaged class can be conceived. Comment, *supra* note 27, at 757; *see* Dunn v. Blumstein, 405 U.S. 330, 349-54 (1972) (state's thirty-day durational residence requirement for voting held violative of the equal protection clause since there were adequate means of achieving the state's interest without infringing on the right to travel). *See generally* Comment, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria,* 27 VAND. L. REV. 971, 996-1006 (1974).

[33] This form of equal protection analysis was first utilized in Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which the court invalidated a San Francisco ordinance having a discriminatory effect against Chinese laundry proprietors. This traditional approach is still employed by the Court. To use this standard, the Court identifies the underlying trait in the legislative classification, ascertains the purpose of the act, and then scrutinizes the relationship between the trait and the purpose. Comment, *supra* note 28, at 606-07.

[34] State legislatures have been permitted wide discretion in enacting laws that differentiate between groups of their citizens. Even though the laws may result in inequality, a state's classification will be set aside under the fourteenth amendment only if no state of facts can be reasonably conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (upheld Maryland's Sunday closing laws against equal protection attack). The practical effect of the application of this level of review is that the legislative classification is upheld as valid by the Court. Wills, *supra* note 31, at 344.

[35] The bare methodology of the two-tiered approach was simple in that the Court applied the strict scrutiny test when fundamental rights or suspect classes were involved, and utilized the rational basis test for all other occasions. However, tension under this simplistic formula was created when personal rights not protected by the Bill of Rights were infringed, or classifications possessing the general attributes of a suspect class were discriminated against. Comment, *supra* note 27, at 757-58; *see* Craig v. Boren, 429 U.S. 190, 197-99 (1976) (refused to apply the rational basis or strict scrutiny level of review in striking an Oklahoma statute that discriminated in the selling of beer on the basis of sex).

rigidity of these two tests led to the adoption of an intermediate level of review[36] that demands more than a rational basis but less than a compelling state interest as justification for a statutory classification.[37] This third test has been applied to sex,[38] illegitimacy[39] and indigency classifications.[40] The Court, however, has been erratic in applying this standard,[41] and has been criticized for its failure to adopt a viable alter-

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[36] Recent developments in the Court's application of the equal protection clause have led to a new level of analysis under the clause. Under this "rationality-scrutiny" test the Court is less willing to supply imaginary means in terms of legislative purpose, for it requires that the legislative purpose have a substantial basis in fact. Through it, the Court places primary concern upon the means of the statute rather than the ends. In using this intensified-means scrutiny the Court allows the state a wide range of proper objectives. Gunther, *supra* note 30, at 18-24; *see* Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972) (Court purported to apply the rational basis test in invalidating a Massachusetts contraceptive law, but actually refused to accept the state's plausible explanation and instead required a substantial basis for the statute).

[37] Note, *supra* note 18, at 616. The three principle elements of this new level of review are "the shifting burden of coming forward with the statutory purpose [of the discrimination], the shifting burden of proof on the reasonableness of the application, and the use of impact or burden as a criterion for determining permissible degree of unequal treatment." Comment, *supra* note 28, at 631-32.

[38] Weinberger v. Wiesenfeld, 420 U.S. 636, 651-53 (1975) (provision of the Social Security Act awarding survivors' benefits to widows but not widowers held unconstitutional); Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973) (federal statute that contained a presumption of dependency for spouses of male members of the armed services, but required proof of dependency for spouses of female members invalidated); Reed v. Reed, 404 U.S. 71, 75-76 (1971) (Idaho statute that gave males preference over females as court-appointed administrators of estates invalidated). *See generally* Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms,* 1975 SUP. CT. REV. 1 (1975); Lonbard, *Sex: A Classification in Search of Strict Scrutiny,* 21 WAYNE L. REV. 1355 (1975).

[39] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-76 (1972) (Louisiana worker's compensation scheme giving lower priority to unacknowledged illegitimates held unconstitutional); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (Louisiana wrongful death statute violated equal protection by denying recovery to dependent, unacknowledged illegitimate children for the wrongful death of their mother).

[40] Douglas v. California, 372 U.S. 353, 356-58 (1963) (indigent defendant cannot be denied counsel in appeal of right).

[41] The pervasiveness of the new standard of equal protection can be attributed in part to its use as an avoidance technique to sidestep head-on collisions with difficult constitutional or moral questions. Gunther, *supra* note 30, at 26. Recent decisions that have employed this intermediate level of review appear to be an accumulation of ad hoc doctrine flexible enough to accomodate the Burger Court's cautious expansion of the principle of constitutional equality. Although the level of scrutiny applied by the Court may appear haphazard or mysterious, it must be viewed in light of rapidly developing equal protection law and the Court's changing membership and philosophy. Wilkinson, *supra* note 30, at 953. *Compare* Dandridge v. Williams, 397 U.S. 471, 483 (1970) (Maryland's ceiling on benefits in its Aid to Families with Dependent Children program upheld under the rational basis test as a legitimate economic interest of the state) *with* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170-72 (1972) (although broad latitude is given state economic

native theory of equal protection analysis.[42]

Although legislative classifications have been subject to equal pro-

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regulations, Louisiana worker's compensation statute denying benefits to illegitimates was subjected to a stricter scrutiny and was found to deny equal protection).

[42] It has been suggested that the Supreme Court should adopt an equal protection test based upon a stronger form of the rational basis test. Gunther, *supra* note 30, at 21. The existing two-tiered formula could also be replaced by a framework that evaluates equal protection cases in terms of an appropriate analogy between the disadvantaged class and a racial minority, objective evidence of a nondiscriminatory purpose of the legislation and sufficient evidence to prove that the discriminatory effect was only incidental to the statute's legitimate purpose. Loewy, *supra* note 26, at 7. A test that would balance the interests of the state against the interests of the disadvantaged class has also been proposed. Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS L.Q. 153, 174 (1975). *See generally* Comment, *supra* note 27, at 758.

Justice Marshall has proposed a sliding scale analysis under which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) (citing Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (upholding Maryland's ceiling on benefits in its Aid to Families with Dependent Children program regardless of the size or needs of the family under the rational basis test as a legitimate economic interest of the state)); *see* Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting) (section of Social Security Act calling for diminished benefits because of applicant's worker's compensation payments is rationally based and thus constitutional). Justice Marshall has argued that a clear analysis of the Court's decisions "reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause" rather than remaining faithful to the two-tiered approach. *Rodriguez*, 411 U.S. at 98-99 (Marshall, J., dissenting). He contended that the Court has actually shifted the degree of scrutiny with "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *Id.* at 99; *see* Eisenstadt v. Baird, 405 U.S. 438, 449-54 (1972) (state statute that denies only unmarried persons access to contraceptives is unconstitutional since the rights of married and unmarried persons are the same). In regard to the affected interest, Justice Marshall has argued:

> Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

Rodriguez, 411 U.S. at 102-03. In reference to the invidiousness of the discrimination in a certain case, Justice Marshall identified instances where the Court had ostensibly considered applying the traditional rational basis level of review, but essentially made its decision using the language and rationale of strict scrutiny when convinced that the particular

tection challenges for over a century,[43] serious equal protection challenges to statutory classifications based on illegitimacy[44] did not arise until a decade ago. In *Levy v. Louisiana*,[45] and a companion case, *Glona v. American Guarantee & Liability Insurance Co.*,[46] the Supreme Court faced the question of whether illegitimates were denied equal protection by a blanket exclusion in Louisiana's wrongful death statute.[47] In *Levy*, five children were denied standing, because of their status as illegitimates, to recover benefits for the wrongful death of their mother.[48] Justice Douglas, writing for the Court, first recognized that children are persons within the meaning of the fourteenth amendment.[49] Determining that states have broad powers in making classifications, he held that the state cannot use that power as a basis for invidiously discriminating against a particular class.[50] Justice Douglas appeared to declare the statute unconstitutional by using the rational basis test,[51] but the deci-

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discrimination warranted such analysis. Justice Marshall further noted that "[d]iscrimination on the basis of past criminality and on the basis of sex posed for the Court the specter of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences." *Id.* at 107; *See* James v. Strange, 407 U.S. 128, 141-42 (1972) (statute providing for recoupment from indigent convicts of legal defense fees paid by the state held to be unconstitutional); Reed v. Reed, 404 U.S. 71, 76 (1971) (Idaho statute giving males preference over females as court-appointed administrators of estates was unconstitutional). In addition, Justice Marshall has observed that the "Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action." *Rodriguez*, 411 U.S. at 108 (Marshall, J., dissenting). Citing the Court's decision in *Weber*, Justice Marshall asserted that discrimination on the basis of birth, like racial discrimination, was something over which a person had no control, and thus called for "special judicial consideration." *Id.* at 109.

[43] See note 27 and accompanying text *supra*.

[44] One notable exception to the precept that statutes governing the rights of illegitimates were not challenged on equal protection grounds prior to Levy v. Louisiana, 391 U.S. 68 (1968), is Brown v. Brown, 183 Va. 353, 32 S.E.2d 79 (1944). In *Brown*, the Virginia Supreme Court of Appeals held that the state's statutory classification, which made only fathers of legitimate children liable for support, did not violate the equal protection clause. 32 S.E.2d at 81.

[45] 391 U.S. 68 (1968).

[46] 391 U.S. 73 (1968).

[47] LA. CIV. CODE ANN. art. 2315 (West 1971).

[48] 391 U.S. at 68-69. *See generally* Gray and Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 19-38 (1969); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969); Krause, *The Bastard Finds His Father*, 3 FAM. L.Q. 100 (1969).

[49] 391 U.S. at 70.

[50] *Id.* at 71.

[51] "Though the test has been variously stated, the end result is whether the line drawn is a rational one." *Id.* at 71-72.

sion contained language[52] that seemed to approach the strict scrutiny level of review. In *Glona,* Justice Douglas rejected the purported state interests in promoting marriages and discouraging promiscuity, and concluded that no rational basis exists for denying a mother's recovery for the wrongful death of her illegitimate son.[53] The majority[54] held that where the party seeking relief is plainly the mother of the deceased child, to withhold the relief sought solely because the child is illegitimate is a denial of equal protection of the law.[55] Following these two decisions there was considerable speculation concerning whether the line of reasoning used by the Court in striking wrongful death laws that discriminated against illegitimates could also be used to invalidate discriminatory succession laws.[56]

The Supreme Court addressed this issue three years later in *Labine v. Vincent.*[57] In that case, a Louisiana law[58] allowing illegitimates who had been acknowledged by their father to inherit only to the exclusion of the state was challenged on equal protection grounds. The statute was upheld under a test that had the appearance of a sub-minimum scrutiny level of review,[59] in which the Court recognized the right of the state to

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[52] "The rights asserted here involve the intimate, familial relationship between a child and his own mother . . . . We conclude that it is invidious to discriminate against [illegitimates] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." *Id.*

[53] Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 75 (1968).

[54] In opposition to the majority, Justice Harlan, in an opinion joined by Justices Black and Stewart, dissented in *Levy* and *Glona,* stating that the classification for recovery for wrongful death along the lines of family relationships was reasonable. *Id.* at 79-80.

[55] *Id.* at 76.

[56] Differences in factual situation and policy considerations dictate that the extension of the *Levy* rationale to succession cases would be undesirable. 29 LA. L. REV. 414, 420-21 (1969).

[57] 401 U.S. 532 (1971).

[58] LA. CIV. CODE ANN. art. 919 (West 1952).

[59] Wills, *supra* note 31, at 353. This suggestion was indicated by the following: "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, the statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." 401 U.S. at 536 n.6. Promotion of family life as a permissible state purpose, as identified in *Labine,* was rejected in *Levy* and *Glona.* See note 53 *supra.* Another curious element of the *Labine* decision was the Court's argument that equal protection analysis may be refused when the discriminatory legislation lies within an area of the law reserved for state regulation. 401 U.S. at 537-39. Justice Brennan, however, questioned the logic of such a position, stating that "no one questions Louisiana's power to pass inheritance laws. Surely the Court cannot be saying that the Fourteenth Amendment's Equal Protection Clause is inapplicable to subjects regulable by the States—that extraordinary proposition would reverse a century of constitutional adjudications." *Id.* at 548-49.

make such a law.[60] The majority[61] emphasized that, unlike the situation in *Levy*, in *Labine* the state had not created an insurmountable barrier to the illegitimate child's inheriting from his father,[62] and that the equal protection clause could not be extended to strike the statute.[63]

The next year, in 1972, the Court reviewed Louisiana's worker's compensation law,[64] which gave dependent unacknowledged illegitimates lower priority rights than legitimate and acknowledged illegitimate children. In *Weber v. Aetna Casualty & Surety Co.*,[65] the Court struck this statutory scheme in an opinion in which Justice Powell proposed a "balancing test"[66] that purported to weigh the state's interest against the endangered fundamental personal right. In a paragraph that formed the basis for *Weber* and future decisions,[67] the Court recognized that the punishment of an illegitimate child because of his status at birth cannot be justified.[68] Although the Court agreed with the state's

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[60] The Court held that the United States Constitution and the people of Louisiana have committed to the legislature the power to make laws to establish, protect, and strengthen family life and to regulate the disposition of property at death. "Absent a specific constitutional guarantee, it is for the legislature, not . . . this Court, to select from among possible laws." 401 U.S. 538-39.

[61] Justice Black wrote the opinion for the Court and was joined by Justice Stewart and Chief Justice Burger. *Id.* at 533. Justices Blackmun and Harlan concurred with the majority. *Id.* at 540. Justice Brennan, in a dissent joined by Justices Douglas, White and Marshall, argued that the majority refused to analyze the discrimination under the fourteenth amendment; had they done so they would have come to the conclusion that there was no rational basis to justify the statute. *Id.* at 558.

[62] The Court pointed out that the child could have inherited the property under a will, by intestate succession if the parents had later married or by intestate succession if the father had formally stated his wish to legitimate the child in his acknowledgement of paternity. *Id.* at 539.

[63] "[T]here is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empowers this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana." *Id.* at 539-40. The decision of the majority in *Labine* appears to be a protest against the Court's expansion of the fourteenth amendment into traditional economic affairs of states. Note, *Labine v. Vincent: Louisiana Denies Intestate Succession Rights to Illegitimates*, 38 BROOKLYN L. REV. 428, 440 (1971).

[64] LA. REV. STAT. ANN. §§ 23:1021(3), 1232(8) (West 1964).

[65] 406 U.S. 164 (1972).

[66] "The essential inquiry . . . is a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Id.* at 173; *see* Gunther, *supra* note 30, at 21; Comment, *Equal Protection in Transition: An Analysis and a Proposal*, *supra* note 28, at 627; 32 ARK. L. REV. 120, 123-24.

[67] Comment, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479, 494 (1974).

[68] Penalizing illegitimate children on the basis of their status at birth was, according to the Court, an unjust and ineffectual way of deterring the parent. Although the Court is powerless to improve the social standing of illegitimates, it will strike classifications based upon illegitimacy where the state has no substantial interest to warrant the discrimination. 406 U.S. at 175.

contention that the protection of family life and the minimization of problems of proof are legitimate interests,[69] it concluded that these interests could not support a statutory classification that bore no significant relation to the recognized purposes of recovery under worker's compensation acts.[70] In reaching this conclusion, the Court appeared to disregard its own balancing test by utilizing an intermediate level analysis of equal protection.[71]

Following *Weber,* the next major[72] illegitimacy decision by the Supreme Court was the 1973 case of *Gomez v. Perez.*[73] In that case, the Court invalidated a Texas support law[74] that denied illegitimate children the right to paternal support. Relying upon *Levy* and *Weber* for support, the Court stated that once the state gave children the right to support, it could not deny that right to illegitimates simply because their natural father had not married their mother.[75]

A few months after deciding *Gomez,* the Court decided another case affecting the rights of illegitimates. In *New Jersey Welfare Rights Organization v. Cahill,*[76] the Court held that New Jersey's assistance to "Families of the Working Poor"[77] program, which limited the awarding of benefits to households of two adults of the opposite sex and at least one child who must be either legitimate or legitimated by adoption, was unconstitutional. In a per curiam opinion, the Court ruled that *Weber, Levy* and *Gomez* were controlling and held that the statute denied illegi-

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[69] *Id.*

[70] *Id.*

[71] Professor Gunther has stated that the Court in *Weber* applied the rationality-scrutiny test. This test, unlike balancing, is concerned only with means, not with ends, and does not attempt to weigh asserted state purposes against individual rights. Gunther, *supra* note 30, at 21; *see* Comment, *Equal Protection in Transition: An Analysis and a Proposal, supra* note 28, at 627; 32 ARK. L. REV. 120, 123-24.

Justice Rehnquist dissented on the ground that by refusing to utilize the rational basis test the Court had improperly applied the equal protection clause and had therefore usurped a proper legislative function. 406 U.S. at 181-82 (Rehnquist, J., dissenting).

[72] Immediately following *Weber,* the Court decided two illegitimacy cases in brief per curiam opinions. Davis v. Richardson, 342 F. Supp. 588 (D. Conn.) (provision of the Social Security Act that prohibited illegitimate children from recovering benefits after the death of their father if there was no residual left from the maximum grant to the wife and legitimate children by assigning the illegitimates a lower priority status denies equal protection of the law), *aff'd mem.,* 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.) (same), *aff'd mem.,* 409 U.S. 1069 (1972).

[73] 409 U.S. 535 (1973).

[74] TEX. FAM. CODE ANN. tit. 1, § 4.02 (Vernon 1970).

[75] 409 U.S. at 537-38. Justices Stewart and Rehnquist dissented from the majority's per curiam opinion on the ground that the constitutional question had not been properly presented to the lower court. *Id.* at 539.

[76] 411 U.S. 619 (1973).

[77] N.J. STAT. ANN. § 44:13-3(a) (West Supp. 1977-1978).

timates the equal protection of benefits that were as indispensable to their health and well being as to that of legitimate children.[78]

The next four cases concerning legislation discriminating against illegitimates dealt with provisions of the Social Security Act.[79] In 1974, the plaintiff in *Jimenez v. Weinberger*[80] challenged provisions of the Act that allowed legitimate children born after a wage earner's disability to qualify for benefits, but disallowed after-born illegitimate children the same benefits unless they could prove actual acknowledgement and dependency prior to their father's disability.[81] The Court adopted neither the strict scrutiny test, as advocated by the plaintiff, nor the rational basis test, as proposed by the Secretary of HEW. Instead, drawing upon *Weber's* analysis that no child is responsible for his status at birth,[82] the Court adopted a means-oriented intermediate level of review.[83] In holding the challenged sections of the statute unconstitutional the Court also attacked the irrebuttable presumptiveness of those sections.[84] The decisions in the first two social security cases,[85] like the previous illegitimacy decisions, left room for much speculation concerning the latitude the Court would allow states and the federal government

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[78] 411 U.S. at 620-21. Justice Rehnquist, the only dissenting justice in the case, argued that the classification was rational and should be upheld. *Id.* at 623 (Rehnquist, J., dissenting).

[79] Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified in scattered sections of 42 U.S.C. and 45 U.S.C.).

[80] 417 U.S. 628 (1974).

[81] 42 U.S.C. §§ 402(d), 416(h)(3)(B) (1976).

[82] 417 U.S. at 632.

[83] Note, *Jimenez v. Weinberger: Applying a New Equal Protection Test*, 10 N. ENG. L. REV. 561, 563-64 (1974).

[84] The Court has attacked irrebuttable presumptions in statutes that deprive a person of liberty or property by presuming that person to be a member of a class without providing him an opportunity to prove otherwise. N. YOUNG, CONSTITUTIONAL LAW 497 (1978); Note, *supra* note 83, at 566-67; *see* Vlandis v. Kline, 412 U.S. 441 (1973) (college tuition system that does not allow students the opportunity to prove residency is unconstitutional). In *Jimenez*, the Court found the classification to be both overinclusive and underinclusive and did not agree with the Secretary's claim that the illegitimates who were excluded from the benefits of the Act were more likely to make spurious claims than illegitimates who were not excluded. 417 U.S. at 637.

Justice Rehnquist dissented on the ground that the classification had a logical basis and should not be invalidated because of the Court's preference for a different legislative scheme. 417 U.S. at 639-40 (Rehnquist, J., dissenting).

[85] Only one week after the *Jimenez* decision, the Court affirmed a Fifth Circuit case that raised the identical issue of eligibility for social security benefits of post-disability illegitimate children. Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973) (denial of social security benefits to illegitimate children born after the disability of their father while granting such benefits to similar legitimate children denies equal protection), *aff'd mem.*, 418 U.S. 901 (1974).

in fixing standards of proof and limiting the procedures through which paternity must be shown.[86]

Unfortunately, the Court's 1976 decision in *Mathews v. Lucas*[87] did little to clarify this confusing situation.[88] In that case, a provision of the Social Security Act[89] conditioning the eligibility of certain illegitimate children upon a showing that their father was either living with them or contributing to their support at the time of his death, but presuming legitimate children to be dependent, was upheld. Writing for the majority, Justice Blackmun rejected the proposition that illegitimacy was a suspect class subject to strict scrutiny review.[90] He quoted the *Weber* balancing test[91] and concluded that the statutory classification was reasonably related to the likelihood of the dependency of the child at the time of the father's death.[92] In reaching this conclusion, the Court distinguished *Lucas* from its previous decision in *Jimenez*.[93]

The last major illegitimacy decision by the Supreme Court[94] prior

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[86] Comment, *supra* note 67, at 531.

[87] 427 U.S. 495 (1976).

[88] Note, *supra* note 22, at 125.

[89] 42 U.S.C. § 416(h)(3)(C) (1976).

[90] 427 U.S. at 506.

[91] *Id.* at 504. See note 67 *supra*. In addition to its specific reference to the test in *Weber*, the Court refered to the level of scrutiny it invoked as "not a toothless one." 427 U.S. at 510.

[92] *Id.* at 509. The Court noted that the congressional purpose in adopting statutory presumptions of dependency was simply to serve administrative convenience. Such presumptions will be upheld as long as they approximate, rather than precisely mirror, the results of a case-by-case adjudication. *Id.*

[93] In the majority opinion, the Court attempted to distinguish the two cases by holding that the conclusiveness of denying benefits to some classes of illegitimates in *Jimenez* was absent in *Lucas* because the child had the opportunity to present proof to refute his presumed status. *Id.* at 512. Justice Stevens, joined by Justices Brennan and Marshall dissenting, stated that the decision of the majority was based upon the traditional thought that illegitimates are less deserving than legitimates. *Id.* at 523 (Stevens, J., dissenting). He pointed out that the only difference between the two cases was that *Jimenez* concerned proof of support prior to the disability of the father and *Lucas* concerned proof of support at the time of death. Therefore, the objections to the classification in *Jimenez* should apply to *Lucas*. *Id.* at 517. The dissenting position in *Lucas* has been warmly received in legal commentaries. *See, e.g.*, Note, *Mathews v. Lucas: A Setback in the Illegitimate's Quest for Equality Under the Law*, 16 J. FAM. L. 37, 54-55 (1978).

[94] The Court has heard two illegitimacy cases since *Lucas* in addition to Trimble v. Gordon, 430 U.S. 762 (1977). On the same day that it decided *Lucas*, the Court affirmed the fourth case in the series of social security cases in light of *Lucas*—Norton v. Mathews, 427 U.S. 524 (1976) (requirement conditioning the receipt of social security benefits by an illegitimate upon a showing that at the time of his father's death the illegitimate child was either living with him or dependent upon him is not a violation of equal protection). In a companion case to *Trimble*, the Court upheld an immigration law in which illegitimates and their fathers were treated differently from illegitimates and their mothers.

to the instant case was the 1977 case of *Trimble v. Gordon.*[95] In its most articulate opinion yet written dealing with the rights of illegitimates, the Supreme Court addressed for the first time since *Labine* the relationship between illegitimates and intestate succession.[96] The Court was asked to determine the constitutionality of the provision in the Illinois Probate Act that barred illegitimates' inheriting from their father unless the father married the mother and acknowledged the child, but allowed legitimate children to inherit from both parents.[97] Justice Powell stated for the majority that the equal protection test to be applied, at a minimum, required that the statutory classification bear a rational relationship to a legitimate state interest.[98] Justice Powell further stated, quoting *Mathews,* that illegitimacy was not a suspect class entitled to the Court's most exacting scrutiny; however, the level of review to be applied was not a "toothless one."[99] The Court found that the state's interests[100] in enacting the statute were overshadowed by the statute's reach[101] since the illegitimate's right of inheritance from her father was

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Fiallo v. Bell, 430 U.S. 787 (1977) (immigration laws are subject to only a very limited review, and classification within these laws on the basis of legitimacy does not violate equal protection).

[95] 430 U.S. 762 (1977).

[96] *Id.* at 766-67; *see* Wills, *supra* note 31, at 365.

[97] ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1961). In 1975, the State Probate Act was replaced by a new probate act. The equivalent section challenged in *Trimble* was recodified without material changes as ILL. ANN. STAT. ch. 3, § 2-2 (Smith-Hurd Supp. 1977).

[98] 430 U.S. at 766-67. Justice Powell delivered the majority opinion and was joined by Justices Brennan, White, Marshall and Stevens. *Id.* at 763. A dissenting statement was presented by Chief Justice Burger, with Justices Stewart, Blackmun and Rehnquist joining, to the effect that *Trimble* and *Labine* could not be distinguished. *Id.* at 776-77. Justice Rehnquist also filed a dissenting opinion arguing that the Illinois act should be upheld because the distinctions made in it between illegitimates and legitimates were not mindless or patently irrational. *Id.* at 785-86 (Rehnquist, J., dissenting).

[99] *Id.* at 767. See note 91 and accompanying text *supra.*

[100] The first state interest mentioned by the Court was the promotion of legitimate family relationships. The Court concluded that this purpose was not apparent from the statute and that to penalize children as a means of influencing parents seemed illogical if the Illinois law was attempting to be more just toward illegitimates. The Court also stated that the acceptance of this justification in *Labine* was made under a perfunctory analysis. 430 U.S. at 768 & n.13. The second purported state interest noted was the establishment of a method of property disposition. The Court rejected this interest because the statute, by unnecessarily excluding categories of illegitimate children, did not provide for the possibility of a "middle ground between the extremes of complete exclusion and case-by-case determination of paternity." *Id.* at 770-71. Preserving the viability of this "interest" for future cases, the Court conceded that the state had a vital interest in the disposition of property, and "[a]bsent infringement of a constitutional right, the federal courts have no role here . . . [and] should accord substantial deference to a State's statutory scheme of inheritance." *Id.* at 771.

[101] *Id.* at 772-73.

denied even though his paternity and obligation to support her had been established in court. The Court rejected the argument that if a citizen failed to make a will, his presumed intention was to dispose of his estate according to the statute, and that the statute could be avoided by action by the father on behalf of the child.[102] The question of whether the statute was tuned to alternative considerations was considered and the statute was found to be lacking,[103] as was the state's justifications for the act when weighed against its discriminatory effect on illegitimates.[104] Although the Court did not overrule *Labine,* it did demonstrate an analyatical shift from the equal protection standard utilized in that case.[105] Because of the Court's failure to identify specifically the appro-

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[102] The Court rejected the appellee's argument that the statute should be upheld because it "mirrors the presumed intention of the citizens of the State." This rejection was based primarily upon the omission of this argument by the lower court in its opinion. *Id.* at 774-75. It is interesting to note that the Court could have achieved the same result by relying upon empirical evidence to demonstrate that in fact public opinion favors the equal treatment of legitimate and illegitimate children for inheritance purposes. H. KRAUSE, *supra* note 2, at 318-20; Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States,* 1978 A.B. FOUNDATION RESEARCH J. 319, 372-73.

Justice Powell stated that by focusing upon measures the intestate could have taken to avoid the effect of the statute, the Court lost sight of the question of the constitutionality of the intestate succession act. If the father had taken such alternative steps, the case would no longer have posed the issue presently before the Court. 430 U.S. at 774.

[103] As in *Lucas,* the Court considered the relation of the statute to alternative considerations. *Id.* at 772. In a revealing footnote, the Court stated that some alternative considerations that would not compromise the states' interests could be utilized. A state is free to recognize the differences in the forms that evidence of paternity may take in fashioning its requirements concerning proof. In cases where there is a formal acknowledgment of paternity, the states' interests would not be compromised by allowing the acknowledged illegitimate to inherit. State statutes will be upheld by the Court when the legislation is "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity." *Id.* at 772 n.14. Thus, the Court indicated that the Constitution did not require all classes of illegitimates to prove paternity in every circumstance, but it did fail to draw clear lines. Note, *Constitutional Law—Equal Protection and the Inheritance Right of Illegitimates Under Intestate Succession Laws,* 43 MO. L. REV. 116, 124 (1978) (Supreme Court has only provided state legislatures with guidelines by which they may determine the requirements necessary to enable an illegitimate to inherit from his father).

[104] 430 U.S. at 769.

[105] The Illinois statute [in *Trimble*] can be distinguished in several respects from the Louisiana statute in *Labine.* The discrimination in *Labine* took a different form suggesting different legislative objectives . . . . In its impact on the illegitimate children excluded from their parents' estates, the statute was significantly different. Under Louisiana law, all illegitimate children . . . were entitled to support from the estate of the deceased parent [while under Illinois law only legitimate or illegitimate children who have been legitimated through marriage of their parents and acknowledgment by their father can inherit from both parents]. Despite these differences, it is apparent that we have examined

priate standard of review and legitimate state interests in equal protection cases involving illegitimacy, lower court opinions relying upon *Trimble* have reached a myriad of conclusions.[106]

In the instant case, the Court recognized initially that since the New York statute was intended to soften the harshness of the previous intestate succession law on paternal inheritance,[107] the issue was whether the remaining statutory barriers were constitutional under the equal protection clause.[108] The Court proceeded to explain that since classifications grounded on illegitimacy are not reviewed with strict scrutiny, they need merely be substantially related to permissible state interests.[109] More specifically, since there are numerous problems involved with proving paternity in an illegitimate's claim of heirship from

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the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine*, the more recent analysis controls.

Id. at 776 n.17; *see, e.g.*, Note, *supra* note 18, at 619; Note, *Constitutional Law: Equal Protection for Illegitimates*, 17 WASHBURN L.J. 392, 392 (1978); 32 ARK. L. REV. 120, 128 (1978); 23 N.Y.L.S.L. REV. 329, 338 (1977).

[106] *See In re* Estate of Burris, 361 So. 2d 152, 155 (Fla. 1978) (statute requiring a written acknowledgment of paternity by the father of an illegitimate in order for the child to inherit through intestate succession violates equal protection); Hughes v. Parham, 241 Ga. 198, 243 S.E.2d 867, 871 (1978) (wrongful death statute that denies the father of an illegitimate child the right to recover for the death of his child but grants this right to the mother does not deny equal protection of the law), *aff'd*, 99 S. Ct. 1742 (1979); Allen v. Harvey, 568 S.W.2d 829, 835 (Tenn. 1978) (in awarding eminent domain proceeds state may not discriminate against an illegitimate child who had lived with his father and was acknowledged and supported by him).

[107] Lalli v. Lalli, 99 S. Ct. 518, 524 (1978). The Court of Appeals read *Trimble* as "inviting exploration of the intent of the Legislature in adopting the particular statute" but found "no relevant materials" in this respect. *In re* Lalli, 43 N.Y.2d 65, 371 N.E.2d 481, 483, 400 N.Y.S.2d 761, 763 (1977), *aff'd sub nom.* Lalli v. Lalli, 99 S. Ct. 518 (1978). In going beyond the record of the lower court, the Supreme Court noted that the law's being challenged was the product of a comprehensive study by the Bennett Commission (Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates), that "consisted of individuals experienced in the practical problems of estate administration." 99 S. Ct. at 525-26. The Court further recognized that the commission, in its report, balanced the rights and needs of illegitimates with the interests of the state. *Id.*

Although the Court relied upon information favorable to the statute, it could have just as easily found information critical of the act. *See* 22 N.Y.L.S.L. REV. 103, 113-16 (1976) (considers the statute challenged in *Lalli* over-restrictive, illogical, and progressive only in comparison to the statute it replaced, and cites lower court opinions criticizing the act). In spite of language to the contrary in *Trimble*, the reliance upon state documents such as legislative reports could have led the Court in the instant case to uphold a classification upon "the mere incantation of a proper state purpose." Trimble v. Gordon, 430 U.S. at 769.

[108] 99 S. Ct. at 524.

[109] *Id.* at 523.

an intestate father,[110] the state has a substantial interest in demanding certain strictures in its statutory scheme of intestate succession.[111] Consequently, since by requiring a judicial decree of filiation as the exclusive method of proving paternity New York had made the administration of estates more accurate and expeditious, the filiation decree requirement was substantially related to a permissible state interest.[112] Finally, the Court added that since the requirement of the New York statute did not bar an unnecessarily large number of illegitimates from inheritance, the breadth of the statute was not outside its justifiable purposes.[113]

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[110] *Id.* at 525-26. Problems specifically referred to by the Court include improper service of process, fraudulent assertions of paternity, excessive delay and the inability of the decedent to defend his name and reputation against unjust accusations. *Id.*

[111] *Id.*

[112] *Id.* at 526-27. The Court limited the scope of its ruling by not passing on the constitutionality of the limitation that the filiation proceeding must be begun " 'during the pregnancy of the mother or within two years from the birth of the child.' " *Id.* at 524 n.5 (quoting N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967)).

The Court distinguished *Trimble* on the basis that the statute therein required "in addition to the father's acknowledgement of paternity, the legitimation of the child through the intermarriage of the parents as an absolute precondition to inheritance." 99 S. Ct. at 524. In addition, the court concluded that the instant case was different from *Trimble* because in *Trimble* the statute was defended as an encouragement of the state's interest in "legitimate family relationships." No such interest was advanced in the present case. *Id.*

Finally, the Court in a footnote reasoned that the dissent's reading of *Trimble* as requiring only a " 'formal acknowledgement of paternity' " to satisfy the state's interest in settling estates, was misplaced. *Id.* at 528 n.11 (quoting *Trimble*, 430 U.S. at 772 n.14). The Court explained that *Trimble* pointed out "that the States are free to recognize the problems arising from different forms of proof and to select those forms 'carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.' " 99 S. Ct. at 528 n.11. The Court noted that " 'formal acknowledgement' " was more specifically described as "a regularly prescribed, legally recognized method of acknowledging paternity." *Id.* The Court then observed that the consent certificate in which the putative father referred to plaintiff as " 'my son' " was notarized, but contained no oath regarding the veracity of its contents. The certificate was for "the purpose of giving consent to marry, and not of proving biological paternity." *Id.* See note 5 *supra.*

[113] 99 S. Ct. at 526-27. Justice Rehnquist concurred in the judgment, citing his dissent in *Trimble. Id.* at 528. See note 98 *supra.*

Justice Stewart, joined by Chief Justice Burger, also concurred. He noted that the majority opinion had "convincingly" distinguished the New York statute in the present case from the Illinois statute in *Trimble.* Justice Stewart was not prepared to say that *Trimble* was a " 'derelict,' " or that the results in *Trimble* and the present decision did not "give authoritative guidance to the courts and legislatures of the several States." 99 S. Ct. at 528-29.

Justice Blackmun wrote a concurring opinion in which he agreed with the Court's result, but disagreed with the Court's "valiant struggle to distinguish, rather than overrule" *Trimble.* Justice Blackmun was thankful for the Court's return to "the principles set forth in *Labine v. Vincent,*" and would have overruled *Trimble.* He regarded *Trimble*

In dissent, Justice Brennan[114] argued that since the New York statute prohibited methods of proving paternity that did not infringe on the state's interests in orderly determination of rights to an intestate's property, the statute was not substantially related to legitimate state interests and was therefore unjustifiably discriminatory.[115] For example, since the state's interest in preventing fraudulent claims of paternity could be satisfied by a formal acknowledgement of paternity or a heightened standard of proof, exclusive use of judicial orders of filiation during the father's lifetime was constitutionally excessive.[116] Additionally, since the state interest in avoiding delayed claims by unknown illegitimates could be served by publication notice and an abbreviated statute of limitations, the statute in the instant case was also unconstitutional in requiring judicial filiation orders entered during the lifetime of the father.[117]

After the decision in the instant case, *Trimble* appears to be the aberrant maverick[118] that *Labine* was once thought to be.[119] The *Trimble* decision had expanded the higher level of review begun by *Weber*[120] and had emasculated *Labine* to a point just short of expressly overruling it.[121] With the Court's fevered attempt to distinguish *Trimble* in the present case,[122] the return of the ghost of *Labine*[123] may be upon us. The concurrences of Justices Rehnquist and Blackmun clearly show they viewed

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as a "derelict"; but added that if it were not, then the validity of all similar statutes would have to be decided on a case-by-case basis "as being on the *Trimble* side of the line, or the *Vincent-Lalli* side." *Id.* at 529.

[114] *Id.* at 529 (Brennan, J., dissenting). Justice Brennan was joined by Justices Marshall, White and Stevens. *Id.*

[115] *Id.* at 530. Justice Brennan noted the "injustice" of the instant case in which each interested party admitted that plaintiff was the son of Mario Lalli, but, "for want of a judicial order of filiation" obtained during the father's lifetime, plaintiff was denied his statutory share of the estate. *Id.* at 529. Justice Brennan also submitted some practical problems in upholding the New York Statute. Justice Brennan contended that the required paternity proceedings would not be brought either because social welfare agencies were too busy, or acknowledged and supported children would not need to, nor want to, for fear of angering their supportive father. *Id.* at 529-30. Also, a father who did not even take time to make a will would not likely "take the time to bring formal filiation proceedings." *Id.* at 530. Thus, the opportunities for those illegitimates, like the plaintiff, who were voluntarily acknowledged and supported, to receive an intestate share of their father's estate were severely limited. *Id.*

[116] *Id.* at 530.

[117] *Id.*

[118] See notes 77 & 78 *supra.*

[119] *See* Comment, *supra* note 27, at 761.

[120] See notes 100 through 105 and accompanying text *supra.*

[121] See notes 105 & 106 and accompanying text *supra.*

[122] See note 112 *supra.*

[123] See notes 57 through 63 and accompanying text *supra.*

the Court's level of review in *Lalli* to be on the scale of that used in *Labine*.[124] Chief Justice Burger and Justices Powell and Stewart appear to be satisfied with a case-by-case determination of classifications based on illegitimacy.[125] On the other hand, Justices Brennan, Marshall, White and Stevens are convinced that the *Trimble* precedent should have been used to invalidate the New York statute.[126]

Although a reversion to the standards of *Labine* may be an exaggeration, the instant case is undoubtedly one more manifestation of the Burger Court's growing dissatisfaction with the two-tiered approach to equal protection review of illegitimacy.[127] Scholars and members of the Court have suggested several approaches the Court might take. It has been proposed that illegitimacy be made a suspect classification like race or ancestry.[128] The Court has recognized this argument but is apparently reluctant to expand the number of classifications deemed suspect.[129] Even if the Court were to adopt this approach, it would not be appropriate since the Court would remain locked into the two-tiered framework.

Another suggested alternative has been the use of balancing tests.[130] The most viable of these tests, however, may be the "multifactor, sliding scale" analysis[131] advocated by Justice Marshall.[132] He contends that the

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[124] See notes 59 and 113 *supra*.

[125] See note 113 *supra*.

[126] See notes 114 through 117 and accompanying text *supra*.

[127] See notes 35 through 42 and accompanying text *supra*. *See* Califano v. Boles, 99 S. Ct. 2767 (1979) (Social Security Act provision granting "mothers insurance benefit" to widows and divorced wives of wage earners but not to mothers of illegitimates was rationally related to important governmental interests, therefore, not violative of fifth amendment equal protection); Caban v. Mohammed, 99 S. Ct. 1760 (1979) (New York statute allowing unwed mother, but not father, to block her child's adoption was not reasonably related to valid state interests and was therefore unconstitutional); Parham v. Hughes, 99 S. Ct. 1742 (1979) (Georgia statute denying father's wrongful death recovery from nonlegitimated child was rationally related to permissible state interests and not violative of equal protection).

[128] Gray & Rudovsky, *supra* note 48, at 15; Comment, *supra* note 27, at 773-75; 1973 WIS. L. REV. 908, 913-14. It is usually argued that illegitimacy is so similar to other suspect classifications that there is no reason not to give it suspect status. *See* Gray & Rudovsky, *supra* note 48, at 5-7; Comment, *supra* note 27, at 774-75.

[129] See note 63 and accompanying text *supra*.

[130] *See* Shaman, *supra* note 42, at 174; Wilkinson, *supra* note 30, at 989-98; Comment, *supra* note 32, at 1022-23. Under the balancing approach, the Court would initially balance the individual interests involved in the classification against the asserted state purpose. If the Court determined that the valid state purpose outweighed the individual rights, it would then consider whether that purpose and the classification were reasonably related. Shaman, *supra* note 42, at 174.

[131] This term was coined by Professor Gunther. Gunther, *supra* note 30, at 17-18.

[132] See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-109 (1973)

Court is actually using this approach without acknowledging it in illegitimacy decisions.[133] If the Court's decision-making is to be meaningful and consistent, it must acknowledge the review standard it is employing and not attempt to adhere to the unworkable two-tiered analysis framework.[134]

Of equal significance to the standard of review in the present case is its effect on the methods available to an illegitimate for establishing paternity under the various states' intestate succession statutes. Those states that have adopted some form of the uniform acts on parentage and probate appear to include constitutionally permissible alternatives.[135] Statutes that allow adjudication are more predictably constitutional under the authority of the instant case.[136] In addition, those statutes that allow the less stringent option of acknowledgement should be allowed to stand, although the prescribed formal requirements will be strictly enforced.[137] Finally, those state statutes allowing establishment of paternity only by intermarriage of the illegitimate's parents[138] are still clearly unconstitutional under *Trimble.*[139] The Court in the instant case found such statutes to be clearly distinguishable from the statute involved in *Lalli,* thereby leaving vitality in the *Trimble* decision.[140]

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(Marshall, J., dissenting) (Justice Marshall rejected the proposition that equal protection cases fall into one of two categories of review; instead, he advocated the balancing of state and personal interests). See note 42 *supra.*

[133] 411 U.S. at 108-09.

[134] *Id.* at 109-10.

[135] See note 22 *supra.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *See* Fellows, Simon & Rau, *supra* note 102, at 370-71. See notes 95 through 106 and accompanying text *supra.*

[140] See notes 22 & 112 *supra.*

SECURITIES REGULATION—RULE 10B-5—MISUSE OF MATERIAL NONPUBLIC INFORMATION OBTAINED THROUGH REGULAR ACCESS TO MARKET CREATES CRIMINAL LIABILITY UNDER RULE 10B-5

Defendant Chiarella, who had allegedly arranged personal stock purchases in reliance on confidential information concerning impending tender offers,[1] was indicted for the wilful misuse of material[2] nonpublic information in connection with securities transactions in violation of sections 10(b) and 32(a) of the Securities Exchange Act of 1934[3] and rule 10b-5.[4] The district court convicted on all counts.[5] Chiarella appealed, arguing that the prohibitions against the use of such information did not apply to him because he was not an "insider."[6] In addition, he argued

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[1] Chiarella was employed by a printer who specialized in printing services for Wall Street brokerages and corporations. Information of upcoming corporate events, such as tender offers, regularly passed through Chiarella's hands before being set in type. United States v. Chiarella, 588 F.2d 1358, 1363 (2d Cir. 1978), *cert granted*, 99 S. Ct. 2158 (1979). On seventeen occasions in five separate tender offers, Chiarella bought stock that he knew would increase in value as soon as the tender offer became public. 588 F.2d at 1363-64. When the value increased, he quickly sold at a profit. *Id.* at 1363. In all, he netted over $30,000 with no risk. *Id.*

[2] Chiarella conceded that the information in question was material. 588 F.2d at 1364 n.5.

[3] Section 10 provides in part: "It shall be unlawful for any person, directly or indirectly . . . (b) To use or employ, in connection with the purchase or sale of any security, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. § 78(j) (1976).

Section 32 (a) provides:

> Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both . . . but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. § 78ff(a) (Supp. I 1977).

[4] Rule 10b-5 provides in part:

> It shall be unlawful for any person, directly or indirectly . . .
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1978).

[5] For the district court's denial of the motion to dismiss, see United States v. Chiarella, 450 F. Supp. 95 (S.D.N.Y. 1978).

[6] This argument was actually broken down into three related claims. The first argu-

that the government failed to prove a specific intent to defraud.[7] On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed. Any person with regular access to material nonpublic information who wilfully misuses such information in connection with securities transactions is criminally liable under rule 10b-5. United States v. Chiarella, 588 F.2d 1358 (2nd Cir. 1978), *cert. granted*, 99 S. Ct. 2158 (1979).

The Security Exchange Act of 1934[8] was among the major congressional responses to the stock market crash of 1929 and the ensuing depression.[9] Through passage of the Act, Congress intended to "insure the maintenance of fair and honest markets,"[10] thus restoring confidence in the financial marketplace.[11] Yet, because of the complex and changing nature of the market,[12] Congress was veritably required to write its anti-fraud provision in general terms of risk ineffectiveness and premature obsolescence.[13] The resulting interpretive problems of section 10(b)

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ment espoused the theory that because he was not an insider of the corporations in whose securities he traded, Chiarella had no fiduciary duty of disclosure to the shareholders who sold to him. 588 F.2d at 1364. Secondly, Chiarella argued that he should be allowed to trade in the stock of the target corporation prior to public announcement of the tender offer because the offering corporations were allowed to do so. *Id.* at 1366. Thirdly, Chiarella reasoned that if he were held liable, it would be because of a novel interpretation of rule 10b-5, which would violate the fair notice element of due process. *Id.* at 1369.

[7] Chiarella argued that under Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), a specific intent to defraud must be found to support a claim under rule 10b-5. 588 F.2d at 1370. Chiarella also claimed that his belief that his actions were in technical compliance with the law was revelant, and therefore admissible into evidence. *Id.* at 1371-72.

[8] Ch. 404, § 1, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a to 78hh-1 (1976)).

[9] Other laws were the Securities Act of 1933, 48 Stat. 74 (codified at 15 U.S.C. §§ 77a to 77bbb) (1976)); Public Utilities Holding Company Act of 1935, 49 Stat. 838 (codified at 15 U.S.C. §§ 79a to 79z (1976)); Investment Company Act of 1940, 54 Stat. 847 (codified at 15 U.S.C. §§ 80a-1 to 80a-52 (1976)); and the Investment Advisors Act of 1940, 54 Stat. 857 (codified at 15 U.S.C. § 80b-1 to 80b-2 (1976)). The foregoing codifications reflect the original acts as presently amended.

[10] Preamble to Securities Exchange Act of 1934, 15 U.S.C. § 78(b) (1976).

[11] Although fraud was not the only reason for the market failure, it certainly was a factor, and the visibility of fraudulent practices was a major reason for the continued lack of confidence. *See generally* R. De Bedts, The New Deal's SEC: The Formative Years ch. 1 (1964); J. Galbraith, The Great Crash (1955); *Stock Exchange Practices, Hearings on S. Res. 84 & S. Res. 239 Before the Subcommittee of the Senate Committee on Banking and Currency*, 72d Cong., 1st & 2d Sess. (1933).

[12] By 1929, both the volume of shares traded and the number of investors involved had reached an all-time high. R. De Bedts, *supra* note 11, at 6-9. Taking advantage of this market activity, unscrupulous persons devised a variety of schemes to defraud unwitting investors. *Id.* at 6-7. In addition, such innovations as margin accounts and international bond markets created widespread opportunities for abuse. *Id.* at 6-8.

[13] One of the drafters of the bill testified before a House committee that section 10(b) meant: "Thou shalt not devise any other cunning devices" and went on to point out that

and rule 10b-5 have given rise to a plethora of litigation.[14] The absence of any clear articulation of what is commonly referred to as the insider trading rule remains one of the most persistent difficulties posed by rule 10b-5.[15] Simply stated, this rule prohibits persons in possession of material[16] nonpublic information from unfairly using that information in connection with securities transactions.[17] Despite its seeming clarity, the rule is fraught with ambiguity, as evidenced by the constant stream of litigation and SEC rulings attempting to define "insider," the class of persons liable.[18]

Originally, courts interpreting rule 10b-5 applied the common law[19] distinction between fraudulent misrepresentation and nondisclosure and held that, although by its literal terms the rule applies to "any

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the section was clearly a "catchall" necessary to the SEC's ability to respond effectively to new fraudulent devices. *Stock Exchange Regulations, Hearings on H.R. 8720 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934).

[14] Plaintiffs have brought suit under rule 10b-5 for allegedly fraudulent transactions involving everything from oyster beds, Errion v. Connell, 236 F.2d 447 (9th Cir. 1956), to Indian land, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972). *See generally* Painter, *Inside Information: Growing Pains for the Development of Federal Corporation Law Under 10b-5*, 65 COLUM. L. REV. 1361 (1965).

In the past few years, however, the Supreme Court has reassessed the congressional intent behind the Securities Exchange Act and has retarded the expansion of rule 10b-5 litigation in some areas. *See* Santa Fe Industries v. Green, 430 U.S. 462, 479-80 (1977) (corporate mismanagement, although a breach of fiduciary duty, is not actionable under rule 10b-5); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197-98 (1976) (simple negligence will not support a rule 10b-5 action); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 755 (1975) (rule 10b-5 right of action limited to actual purchaser or seller).

[15] Rule 10b-5 itself says nothing about insiders. See note 4 *supra*. The insider trading rule evolved from and has been refined by numerous court decisions. *See, e.g.*, Brown, *Recent Developments in Corporate Disclosure: Corporate Directors' Problems*, in FIRST ANNUAL INSTITUTE ON SECURITIES LAWS AND REGULATIONS 341, 341-46 (Liakas ed. 1977) (stating that rule 10b-5 has required more litigation than any other securities law); Painter, *supra* note 14, at 1361 *passim*.

[16] Although courts employ different tests of materiality, most tests are satisfied if the information would influence the transactions of a reasonable person. *See* SEC v. Lum's Inc., 365 F. Supp. 1046, 1050 (S.D.N.Y. 1973) (forecast of sharply lower earnings); Ross v. Licht, 263 F. Supp. 400, 409 (S.D.N.Y. 1967) (knowledge that public market was being made which would increase value of stock); Cochran v. Channing Corp., 211 F. Supp. 239, 243 (S.D.NY. 1962) (knowledge of improperly lowered dividend).

[17] Brown, *supra* note 15, at 341-46.

[18] *See* Fleischer, Mundheim & Murphy, *An Initial Inquiry Into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798, 798-809 (1973); Jennings, *Insider Trading in Corporate Securities: A Survey of Hazards and Disclosure Obligations Under Rule 10b-5*, 62 NW. U.L. REV. 809, 809-16 (1968).

[19] *See* Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946) (court applied general tort principles to an early rule 10b-5 case); Jennings, *supra* note 18, at 816-23. *But see* Note, *The Prospects for Rule 10b-5: An Emerging Remedy for Defrauded Investors*, 59 YALE L.J. 1120, 1123-33 (1950).

person," liability for nondisclosure was triggered only when a party to the transaction had some fiduciary duty[20] or knowledge of "special facts."[21] The resulting restrictive definition of "insider" included only corporate officers, directors and primary shareholders,[22] all of whom occupied a fiduciary relationship to minority shareholders.[23] Accordingly, such insiders have the duty not to use their superior knowledge for their own benefit at the expense of the investors.[24] Hints of a more expansive theory of insider liability appeared in the 1951 decision of *Speed v. Transamerica Corp.*,[25] where, by implying a difference between a fiduciary duty and a duty arising from "special circumstances,"[26] a federal district court intimated that the purpose of the rule was to prevent unfairness rather than to enforce fiduciary duties.[27]

Not until a decade later, in *In re Cady, Roberts & Co.*,[28] was the importance of the fiduciary duty as a determinative factor threatened. Since that case concerned a non-insider "tippee" who traded on information he had received from an insider, the SEC was faced with choosing between radically expanding the notion of fiduciary duty or finding no violation.[29] Rejecting both alternatives, the Commission announced

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[20] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 106 (4th ed. 1971).

[21] Strong v. Repide, 213 U.S. 419 (1909). In *Strong*, the president of a company bought, through an agent, stock in the company from a shareholder. *Id.* at 425-26. He failed to disclose to the shareholder information of developments that were soon to increase greatly the value of the stock. *Id.* at 426-27. Since he had "special facts" by virtue of his position, the Court held that he had a duty to disclose the facts to the shareholder before purchasing her stock. *Id.* at 431-32.

[22] *See, e.g.*, List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), *cert. denied*, 382 U.S. 811 (1962); Northern Trust Co. v. Essaness Theatres Corp., 103 F. Supp. 954 (N.D. Ill. 1952); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946); *In re* Ward LaFrance Truck Corp., 13 S.E.C. 373 (1943).

[23] Jennings, *supra* note 18, at 815-16.

[24] Besides this analysis, a practical reason for the original definition of "insider" was the statutory restriction on corporate officers, directors and primary shareholders from short-swing trading. *See* 15 U.S.C. § 78p(a) (1976).

[25] 99 F. Supp. 808 (D. Del. 1951).

[26] *Id.* at 829. This distinction became of paramount importance in later developments of insider liability theory. See notes 29 through 32 and accompanying text *infra*.

[27] 99 F. Supp. at 829. In a different context, this point was made by the Supreme Court in Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479-80 (1977).

[28] 40 S.E.C. 907 (1961).

[29] The SEC was seeking an injunction against a brokerage house because one of the house's salesmen had learned of a dividend cut and had quickly unloaded thousands of shares of the involved stock. *Id.* at 908. The salesman had received the tip from one of his associates who happened to be a director of the corporation that announced the cut. *Id.* at 909. Although the director clearly could not have sold to the buying public, and as the Commission stated, by "logical sequence" his associate also could not have, there was no indication that any sort of vicarious fiduciary duty was imposed. *Id.* at 910-11. The "logical sequence" stemmed instead from the access to information. *Id.* at 912.

a new analytical framework for the insider trading rule based on a relationship giving access to inside information rather than on a relationship giving rise to some fiduciary duty.[30] No longer burdened by the need to find a fiduciary relationship, the courts could now expand liability for unfair trading under rule 10b-5[31] and hold liable corporate employees,[32] broker-dealers,[33] accountants,[34] attorneys,[35] banks,[36] stock exchanges,[37] tippees,[38] corporations[39] and corporate directors.[40] *Cady, Roberts* created

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[30] The Commission stated:

> The obligation to disclose rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing . . . . Thus our task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs . . . .

Id. at 912.

[31] *Cady, Roberts* provided a new basis for the duty to disclose. The opinion implied the existence of a general duty, other than a fiduciary duty, upon any investor or potential investor. With its decision in *Cady, Roberts,* the SEC took the position that there should be a parity of information, or at least a parity of access to information, between the buyer and seller in any stock or securities transaction. Fleischer, Mundheim & Murphy, *supra* note 18, at 804-09; *see* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (en banc) (court relied on *Cady, Roberts* as the essence of rule 10b-5), *cert. denied,* 394 U.S. 976 (1969).

[32] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (en banc), *cert. denied,* 394 U.S. 976 (1969).

[33] Shapiro v. Merrill, Lynch, Pierce, Fenner, and Smith, Inc., 495 F.2d 228, 229 (2d Cir. 1974) (citing *Cady, Roberts,* 40 S.E.C. at 912-13). Although brokers are already prohibited from certain activities by other sections of the Securities Exchange Act, 15 U.S.C. §§ 78h, 78k, 78o-1 to -3 (1976), it often seems preferable to bring the action under rule 10b-5 and section 10(b), the terms thereof being "broad enough to blanket almost all malpractices in securities transactions." Note, *supra* note 19, at 1130-33.

[34] Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 121-22 (S.D.N.Y. 1974) (accountants have special duty to public to disclose information properly), *aff'd in part and rev'd in part on other grounds,* 540 F.2d 27 (2d Cir. 1976).

[35] SEC v. Frank, 388 F.2d 486, 489 (2d Cir. 1968); Blakely v. Lisac, 347 F. Supp. 255, 266 (D. Or. 1972).

[36] Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972) (bank with knowledge that its employees were making improper resale market to defraud customers held liable).

[37] Carr v. New York Stock Exchange, Inc., 414 F. Supp. 1292, 1300 (N.D. Cal. 1976) (exchange would be liable if it failed to carry out its contractual duties).

[38] SEC v. Shapiro, 494 F.2d 1301, 1307-09 (2d Cir. 1974) (negotiator between merging companies has intimate knowledge of corporate affairs).

[39] Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 787 (2d Cir. 1969) (corporation secretly affiliated itself with another corporation to defeat tender offer), *cert. denied,* 400 U.S. 822 (1970). See notes 56 through 58 and accompanying text *infra.*

[40] Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963) (former director who sold

problems of its own, however, by requiring as a prerequisite to the imposition of liability the finding of a special relationship.[41] For years courts were torn between the rule 10b-5 "any person" clause and the *Cady, Roberts* "relationship giving access" test.[42] Moreover, courts added to this confusion by frequently including in their opinions dicta containing new doctrines much broader than were necessary to decide a given case.[43] Such a tendency was displayed by the Court of Appeals for the Second Circuit in its 1968 decision in *SEC v. Texas Gulf Sulphur Co.*[44] when the court stated that "anyone in possession of material inside information" was liable if he traded without making disclosure.[45] Because that case involved corporate employees who met the *Cady, Roberts* access test,[46] the sweeping statement of the court was unneces-

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stock back to company could not press claim because of his intimate knowledge of company).

[41] *Cady, Roberts,* 40 S.E.C. at 912. Note that the *Cady, Roberts* analysis reveals only an implication that parity of information is required by fairness. The opinion specifically pointed out that the primary basis of the obligation was a "relationship giving access" to information, and that the court's task was "to identify those persons who are in a special relationship with a company." (emphasis added). *Id.* at 912. See notes 29 & 30 and accompanying text *supra.*

[42] See notes 43 through 67 and accompanying text *infra.*

[43] *See* Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), where the court stated:

> Section 10(b) relates to "any person" who uses "manipulative or deceptive" practices. Proof of a purchaser's status as an "insider" is, therefore, not essential to a Rule 10b-5 violation . . . . Congress did not intend for courts to become lost in conclusory language, but to effectuate the desirable ends of the Act.

Id. at 739. Despite this expansive language, the case involved a corporate director who was clearly an insider even under a pre-*Cady, Roberts* analysis. *Id.* at 729-32.

[44] 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied,* 394 U.S. 976 (1969).

[45] 401 F.2d at 848. The court prefaced its statement of the rule with its finding that rule 10b-5

> is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information . . . .
>
> [T]he Rule is also applicable to one possessing the information who may not be strictly termed an 'insider' within the meaning of Sec. 16(b) of the Act. . . . Thus, anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed.

Id.

[46] The case involved a mineral strike by the defendant corporation. *Id.* at 844-47. Also named as defendants were employees of the corporation who knew of the strike and had at least strong hints that the strike was a rich one. *Id.* at 839-42. These employees ranged from corporate officers to the on-site geologists who witnessed the strike. *Id.* at 843-46. Since they used this knowledge in deciding to purchase corporate stock before public

sary.[47]

Within four months of the *Texas Gulf Sulphur* decision, the Second Circuit issued two other opinions that seemed to limit drastically the rule in *Texas Gulf Sulphur.* In *General Time Corp. v. Tally Industries, Inc.,*[48] the court, arguably retreating to a pre-*Cady, Roberts* position, resurrected the fiduciary duty requirement.[49] In that case, a corporation acquiring stock in another corporation failed to disclose its intention to eventually merge.[50] Although shareholders without this information were put at a trading disadvantage,[51] the court imposed no liability on the acquiring corporation for the sole reason that it had no fiduciary duty to the selling shareholders.[52] *Texas Gulf Sulphur* was further restricted by language in the Second Circuit's en banc decision in *SEC v. Great American Industries, Inc.,*[53] involving the failure to disclose

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disclosure was made, they were brought under the insider trading rule and found liable. *Id.* at 852.

[47] The *Texas Gulf Sulphur* decision was viewed by some observers as a departure from prior interpretations of rule 10b-5. It is more plausible, however, that it was merely an expansion, and a slight one at that, of the principles put forth in *Cady, Roberts,* and thus arguably was less radical than it appeared on first observation. By virtue of their jobs the employees clearly met the "relationship giving access" test. Indeed, the *Texas Gulf Sulphur* court relied heavily on *Cady, Roberts* in reaching its decision. See note 31 *supra.* For an argument that *Texas Gulf Sulphur* was a radical decision, see Kennedy & Wander, *Texas Gulf Sulphur, A Most Unusual Case,* 20 Bus. Law. 1057, *passim* (1965). *But see* Fleischer, *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceedings,* 51 Va. L. Rev. 1271, *passim* (1965).

[48] 403 F.2d 159 (2d Cir. 1968), *cert. denied,* 393 U.S. 1026 (1969).

[49] The court stated: "We know of no rule of law . . . that a purchaser of stock, who was not an 'insider' and had no fiduciary relationship to a prospective seller, had any obligation to reveal circumstances that might raise a seller's demands and thus abort the sale." 403 F.2d at 164. (emphasis added).

[50] *Id.* at 160-61.

[51] The defendant corporations had acquired at market prices over 21% of the common stock of the plaintiff corporation. *Id.* at 161. Since a merger or tender offer would presumably offer a premium price for the shares, anyone who sold to the defendants before disclosure of the merger plans did so at a lower price than he would have if the merger plans had been known. *Id.* at 164.

[52] The plaintiff corporation was pressing this claim on behalf of its stockholders and former stockholders, and it was decided that the defendant buyers had no duty to the former shareholders who had sold. *Id.* at 164-65. In this sense, it might be argued that the buyers did not even have inside information, but rather material outside information, *i.e.* information they had created themselves. Congress, however, amended the 1934 Act by passage of the Williams Act in 1968, 82 Stat. 455 (codified at 15 U.S.C. § 78m(d)-(f) (1976)). The amendment requires the filing of a full statement of holdings by any owner of 5% or more of any class of outstanding corporate stock. *See* 15 U.S.C. § 78m(d) (1976). In addition, disclosure of any intent to merge, to make a tender offer or to liquidate assets of the issuing corporation must be made. *Id.* § 78m(d). *See also id.* § 78n(d), which imposes basically the same obligations on beneficial owners soliciting proxies.

[53] 407 F.2d 453 (2d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 920 (1969).

that most of the consideration paid for mineral leases went to finders instead of to the sellers.[54] Although this withholding of information led the public to believe that the corporation had acquired valuable mineral assets, the court ruled that requiring a party with no special relationship to a buyer or seller to make disclosure would be a novel interpretation of rule 10b-5.[55]

Less than a year later the Second Circuit, in *Crane Co. v. Westinghouse Air Brake Co.*,[56] again modified its position. Relying on *Texas Gulf Sulphur* and ignoring *General Time*,[57] the court indicated that the special relationship existed where one corporation was acquiring another corporation if facts showed that inside information flowed from the acquiring corporation to the target corporation.[58] This analysis is indicative of the importance the court placed on finding a special relationship and suggests that the court was seeking some middle ground between the expansive language and the real situation found in *Texas Gulf Sulphur*.[59]

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[54] 407 F.2d at 460. The defendant corporation acquired mineral properties from the defendant sellers and paid for them with large blocks of stock. *Id.* at 455. Most of the stock, however, went not to the sellers but to intermediaries as finders' fees. *Id.* In only one such transaction did the corporation know about the unusual distribution of payment and failed to make this disclosure when it announced acquisition of the properties. *Id.* at 458-59. The sellers and intermediaries disclosed nothing. *Id.* at 460. The announcements, made in optimistic language, caused the price of the stock to shoot from 2 points up to 14 ⅝. *Id.* at 455. The SEC based its suit for an injunction on its view that full disclosure by all parties of the true situation would not have caused such a fluctuation. *Id.*

[55] *Id.* at 460; *cf. id.* at 462-64 (concurring opinions of Hayes, Kaufman and Waterman, J.J.) (all opinions suggested a broader application of rule 10b-5 to require disclosure of information to the buying public, not just to insiders).

[56] 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).

[57] Although the opinion cited *General Time*, the citation is made only in reference to the establishing of a causal connection necessary for determination of damages, and is not relevant to the issue here. *Id.* at 797.

[58] 419 F.2d at 796. In this case, the plaintiff corporation's tender offer was defeated by the secret buying and selling by a competitor also planning a tender offer for the same target. *Id.* Because the competitor was not "hostile" to the target and communicated its transactions in target stock to the target company's management, the court found it to be an insider and held the corporation liable for nondisclosure of its transactions. *Id.* Note, however, that the flow of information was from the outside corporation to the corporation whose securities were traded. *Id.*

[59] In Gold v. Sloan, 486 F.2d 340 (4th Cir. 1973), *cert. denied*, 419 U.S. 873 (1974), the court returned to a test based purely on information similar to the stated test in *Texas Gulf Sulphur*. In applying this test, the court found that an officer of a corporation was not an insider unless he had material inside information, that is, unless the officer "had or was likely to have access to inside information." 486 F.2d at 344 (quoting Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 592 (1973)). In short, the test was whether the person had information rather than whether he occupied a traditionally defined inside position. 486 F.2d at 343-44.

In 1972, the Supreme Court, in *Affiliated Ute Citizens v. United States,*[60] seemed to resurrect once again the fiduciary relationship standard. Finding a violation of rule 10b-5 in the actions of transfer agents for an Indian tribe,[61] the Court stated that the agents' duty rested on their assumption of a fiduciary relationship with the selling Indians.[62] Furthermore, the violation was the active solicitation of a secondary resale market that provided the agents with considerably higher profits rather than simply a passive failure to disclose facts to the Indians.[63]

Meanwhile, the SEC was refining its own test. *In re Investors Management Co.*[64] closely followed the *Cady, Roberts* analysis by emphasizing the importance of equal access to information.[65] At that point, the SEC departed from the *Cady, Roberts* analysis and formulated a less restrictive test,[66] specifically eliminating the need to find a relationship making access to the information possible.[67] Furthermore, subtle differences in the language employed indicated an even greater distance between *Investors Management* and *Cady, Roberts,* and, for that matter,

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[60] 406 U.S. 128 (1972).

[61] *Id.* at 156-57. The Ute Development Corporation (UDC) had been formed to hold the tribal assets of certain Ute Indians. *Id.* at 134. Each tribal member was issued stock and all of the stock was deposited with the defendant bank for safekeeping. *Id.* at 136-37. Two individual defendants who were employed by the bank purchased shares from the Indians, reselling many of them to other non-Indians at a profit and failing to disclose to the Indians information of the resale market. *Id.* at 146-48.

[62] *Id.* at 152. The bank had assured the tribe that it would assume the "duty to see that these transfers were properly made and that it would be acting for the individual shareholders." *Id.* It should be noted that the United States, also a defendant because of its alleged neglect of the Indians, was absolved from guilt because it had terminated its supervision over the Indians in 1961 by removing its restrictions on the selling of UDC stock. *Id.* at 149-50. In short, the Supreme Court decided that the United States had not violated rule 10b-5 because it had no fiduciary duty. *Id.*

[63] *Id.* at 153. The Court stated that "if the two men and the employer bank had functioned merely as a transfer agent, there would have been no duty of disclosure here. But . . . the record shows that [the defendants] 'were active in encouraging a market for the UDC stock among non-Indians.'" *Id.* at 152.

[64] *In re* Investors Management Co., 44 S.E.C. 633 (1971).

[65] *Id.* at 640-41.

[66] The Commission stated the elements of the test as (1) that "the information in question be material and non-public," and (2) that the tippee, whether receiving the information directly or indirectly, know or have reason to know that it is non-public and has "been obtained improperly by selective revelation or otherwise." *Id.* at 641.

[67] We reject the contentions advanced by respondents that no violation can be found unless it is shown that the recipient himself occupied a special relationship with the issuer or insider corporate source giving him access to non-public information, or, in the absence of such relationship, that he had actual knowledge that the information was disclosed in a breach of fiduciary duty not to reveal it.

Id. at 643.

Texas Gulf Sulphur. For example, the "inside" information referred to in *Texas Gulf Sulphur* was called "nonpublic" information in *Investors Management*.[68] This linguistic discrepancy suggests that the information need not necessarily have emanated from the corporation whose securities were traded.[69] Instead, there was the implication that the use in investment decisions of any information not generally available to the investing public was prohibited.[70] This position was taken in 1972 by a district court in *Courtland v. Walston & Co.*,[71] where an author of a market letter was found to be in violation of rule 10b-5 for having given advance notice of forthcoming "buy recommendations" to selected customers.[72] The next year, however, the Ninth Circuit indicated the continuing importance of the fiduciary duty requirement.[73] In that same year, the questions presented to the SEC in *Investors Management* were put before a district court in *SEC v. Lum's Inc.*,[74] with the disclosers of the information all being held liable in the absence of a fiduciary relationship.[75]

Thus, despite the confusing vacillation of the courts, it nevertheless seemed fairly clear that liability under the insider trading rule was

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[68] *Id.* at 633.

[69] Commissioner Smith argued against this point in a special concurring opinion. He took the position that inside information must come from the inside, and if it leaks out it is because of a breach of duty somewhere along the line. *Id.* at 649-50 (Smith, Commissioner, concurring). He would have rephrased the test offered by the majority to include use of information by anyone who knew or had reason to know that the information became available "through a breach of duty owed to the corporation not to disclose or use information for non-corporate purposes." *Id.* at 650 (Smith, Commissioner, concurring).

[70] The majority seemed to stretch its theory of liability to the limits when it stated that liability probably would attach to a person who innocently came into information if he used it knowing it was meant to be confidential. *Id.* at 641 n.18.

[71] 340 F. Supp. 1076 (S.D.N.Y. 1972).

[72] Although the author had no inside knowledge and his recommendations were based only on his analysis of publicly available information, the court ruled that any selective disclosure of this information prior to the letter's public appearance would be in violation of rule 10b-5. *Id.* at 1082. Perhaps sensing that it might be treading on new ground, the court made the ruling without any analysis or explanation. *Id.*

[73] Strong v. France, 474 F.2d 747, 751 (9th Cir. 1973) (no obligation to disclose if no fiduciary duty owed to other party). For a discussion of the relationship between the doctrine of fiduciary duty and rule 10b-5, see 3 L. Loss, Securities Regulation 1445-53 (2d ed. 1961).

[74] 365 F. Supp. 1046 (S.D.N.Y. 1973).

[75] The president of Lum's had disclosed to a broker-dealer information of sharply lower earnings projections. *Id.* at 1053-54. The broker-dealer passed this information along to one of its customers, an institutional investor, who then sold out of its position in Lum's debentures on the basis of the information. *Id.* at 1055. The court followed the tip down the line and held liable all links in the chain. *Id.* at 1057-64. However, because this was an injunctive suit and the institutional investor had already admitted its violation in a consent decree, there was no discussion of the investor's liability. *Id.* at 1065.

steadily being determined more and more by use of a test based not on relationships, but on the nature and possession of material nonpublic information.[76] Where the prior emphasis had been on the definition of insider, the current emphasis focuses on the establishment of parity of access to material information between the buyer and seller regardless of their relationship to each other.[77] In keeping with this goal, courts are at the same time replacing the notion of inside information with one of nonpublic "market information."[78] Nonpublic market information differs from inside information in that it need not emanate from the corporation whose securities are being traded and that it affects only the market price, not the actual long-term value, of the stock.[79] However, application of the concept of "market information" to rule 10b-5 is more troubling than was the relatively simple notion of inside information since persons in possession of nonpublic market information need not have any relationship with the corporation or its stockholders.[80] Furthermore, complete acceptance of the "fairness doctrine"[81] in securities law is not yet assured.[82]

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[76] SEC v. Great Am. Indus., 407 F.2d 453, 462 (2d Cir. 1968) (en banc) (Kaufman, J., concurring), *cert. denied*, 395 U.S. 920 (1969).

[77] Fleischer, Mundheim & Murphy, *supra* note 18, at 805-09.

[78] *Id.* at 808.

[79] *Id.* at 799. Market information includes news of an impending tender offer or of a forthcoming recommendation by an analyst to buy a certain security. *Id.*

[80] *Id.*

[81] The second basis for the insider trading rule as applied in *Cady, Roberts* hinged on unfairness. See note 30 *supra.* Despite the court's use of the "fairness doctrine" in *Cady, Roberts,* Fleischer, Mundheim and Murphy seem unwilling to accept the "fairness doctrine" totally because of the ambiguities that would result. Instead, they think that the liability for improper trading should be limited to easily definable classes, although they do seem willing to depart from traditional classifications. Fleischer, Mundheim & Murphy, *supra* note 18, at 816-18. *But see* Wander, *Takeovers: Preparing the Attack,* in 2D ANNUAL INSTITUTE ON SECURITIES REGULATION 7, 11-13 (A. Fleischer & R. Mundheim eds. 1970).

[82] The "fairness doctrine" has not yet been accepted in the law surrounding tender offers. For example, the offering corporation may frequently attempt to insure success of the offer by using selective tipping and "warehousing." *See generally,* Note, *Cash Tender Offers,* 83 HARV. L. REV. 377 (1969). These devices involve confidential revelation of the planned offer to friendly parties—frequently institutional investors—so that they can purchase and "warehouse" target securities. When the offer is made public, the stocks are tendered, thus assuring the tippees and warehousers a quick profit and the offerors a successful takeover. Although such practices definitely involve material non-public market information and might also result in unfair inequalities of access of information between buyers and sellers, no court has yet found the practices to be in violation of rule 10b-5. Fleischer, Mundheim & Murphy, *supra* note 18, at 812-17. Fleischer, Mundheim and Murphy note further that warehousing serves a useful purpose and may even take the place of interim financing for the offer when the offeror gives advance notice to a mutual fund in exchange for financial aid. *Id.*

Apart from the question of liability, courts have also struggled to arrive at a uniform statement of the degree of culpability necessary to sustain a civil action for nondisclosure based on a violation of rule 10b-5.[83] Some courts have held that it would be unfair to hold civilly liable a party who had innocently made false or misleading statements or omissions.[84] Thus, knowledge that a representation is misleading is generally necessary for proof of a rule 10b-5 violation.[85] This rule applies unless the maker of the statement had a special duty to issue a truthful statement[86] or made a statement he knew had no basis in fact.[87] Similarly, liability for failure to make any statement at all is limited under this rule to persons who know that a party to the transaction will not have such material information.[88] Although some courts have gone a step further and required proof of a specific intent to defraud,[89] others

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In fact, a district court has ruled that a corporation may properly encourage even its own directors to purchase stock in another corporation with which it plans to amalgamate. Cohen v. Colvin, 266 F. Supp. 677 (S.D.N.Y. 1967). In *Cohen,* the court granted the defendant's motion for summary judgment because the plaintiff failed to state a cause of action under the Securities Regulation Act. *Id.* at 679. Furthermore, the SEC considered the role of warehousers in its Institutional Investor Study and concluded that warehousing by institutional investors is not a violation of rule 10b-5, though it might create informational advantages. SEC, INSTITUTIONAL INVESTOR STUDY—REPORT SUMMARY (Special Studies Transfer Binder) CCH Fed. Sec. L. Rep. § 74,701 (1970), at 65, 482. For statutory regulation of tender offers, see note 52 *supra.*

[83] *See* Bucklo, *The Supreme Court Attempts to Define Scienter Under Rule 10b-5: Ernst & Ernst v. Hochfelder,* 29 STAN. L. REV. 213, 214-15 (1977). *See also* Ruder, *Factors Determining the Degree of Culpability Necessary for Violation of the Federal Securities Laws in Information Transmission Cases,* 32 WASH. & LEE L. REV. 571, 575-77 (1975) (discusses the different approaches to determining the state of mind necessary for a violation of rule 10b-5).

[84] White v. Abrams, 495 F.2d 724, 728-29 (9th Cir. 1974) (no violation of rule 10b-5 if maker of misleading statement has no knowledge or special duty to issue accurate statement); SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912, 917 (S.D.N.Y. 1969) (denial of plaintiff's motion for summary judgment in light of defendant's affidavit stating that he did not know or have reason to know the falsity of his statements).

[85] Ruszkowski v. Hugh Johnson & Co., 302 F. Supp. 1371, 1375 (W.D.N.Y. 1969) (dismissal of action after trial for failure to allege and prove that defendant had knowledge that his statements were misleading).

[86] Stier v. Smith, 473 F.2d 1205, 1210 (5th Cir. 1973) (issuer of securities having knowledge that buyer was relying on corporate situation had obligation to disclose changes in situation).

[87] United States v. Mackay, 491 F.2d 616, 623 (10th Cir. 1973) (statement that is either patently false or made with reckless indifference to truth can be equivalent of intent to defraud), *cert. denied,* 416 U.S. 972 (1974). *See also* Elbel v. United States, 364 F.2d 127, 134 (10th Cir. 1966) (anti-fraud violation of Securities Act); Gasow v. United States, 347 F.2d 755, 756 (10th Cir. 1965) (reckless disregard standard discussed in mail fraud indictment).

[88] Stier v. Smith, 473 F.2d 1205, 1210 (5th Cir. 1973).

[89] Thomas v. Duralite Co., Inc., 524 F.2d 577, 583 (3rd Cir. 1975) (a basic element of

have foregone this requirement by holding that knowledge alone is sufficient.[90] Leaving many questions in this area unanswered, the Supreme Court held in *Ernst & Ernst v. Hochfelder*[91] that "some degree of scienter"[92] was necessary to sustain a civil action based on rule 10b-5, but expressly declined to decide whether negligence of a reckless variety would be actionable.[93]

The necessary degree of culpability presents even more difficulty in the context of a criminal prosecution[94] under rule 10b-5 because of a proviso in the penalty clause stipulating that no person shall be imprisoned "for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."[95] This limitation seems to require proof of a specific intent to violate a particular rule. Fortunately, courts are in agreement on the level of knowledge necessary to sustain a rule 10b-5 criminal conviction. In *United States v. Lilley*,[96] the court formulated a presumption that every person had knowledge of the substance of the law and that having no specific knowledge of the corresponding rule was therefore no defense.[97] Furthermore, other courts have held that the burden of proof for the "no knowledge" exception is on the defendant and that the prosecution's failure to raise the argument is not error.[98]

Criminal prosecutions under rule 10b-5 also raise other problems of culpability since the standard of proof required to establish criminal

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a rule 10b-5 suit in scienter; *i.e.*, the intent to defraud). *See generally*, 3 A. BLOUMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 9.21[4] (1972) (an overview of intent to deceive in the securities context).

[90] Hanly v. SEC, 415 F.2d 589, 596 (2d Cir. 1969) (specific intent to defraud is irrelevant).

[91] 425 U.S. 185 (1976). The Court noted that there was substantial disagreement in the lower courts concerning the level of intent necessary to sustain a rule 10b-5 action. *Id.* at 193 n.12.

[92] *Id.* at 193 n.12. Although this standard might be interpreted as requiring proof of specific intent, one distinguished commentator saw little more in the decision than the Court's intention to rule out simple negligence as a basis for a private rule 10b-5 action. Bucklo, *supra* note 83, at 216-24.

[93] 425 U.S. at 194.

[94] *See generally* Herlands, *Criminal Law Aspects of the Securities Exchange Act of 1934*, 21 VA. L. REV. 139, 190-92 (1934) (discussion of the Act's provisions); Matthews, *Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases*, 39 GEO. WASH. L. REV. 901, 957-58 (1971) (discussion of cases involving section 10(b)).

[95] 15 U.S.C. § 78ff(a) (1976).

[96] 291 F. Supp. 989 (S.D. Tex. 1968).

[97] *Id.* at 992-93.

[98] United States v. D'Honau, 459 F.2d 73, 75 (9th Cir.), *cert. denied*, 409 U.S. 861 (1972).

intent is more stringent.[99] This issue also has fairly clear precedents that sufficiently describe the required level of proof. In *United States v. Dixon*,[100] the Second Circuit approved a jury instruction stating that "an act is done willfully if done intentionally and deliberately."[101] This instruction was followed by the Ninth Circuit in a post-*Hochfelder* case.[102] Thus, all that is required to sustain a criminal conviction under rule 10b-5 is proof that the defendant acted with knowledge that he was doing a wrongful act and that the act violated the substantive law.[103]

In the instant case, the court reasoned that since section 10(b) and rule 10b-5 apply to any person,[104] the fact that Chiarella was not technically an insider was irrelevant.[105] The court ruled instead that Chiarella, occupying a position inside the market that gave him regular access to market information,[106] had an affirmative duty either to disclose the information or to refrain from trading.[107] In addition, the court found that since Chiarella was not in the position of a tender offeror,[108] he could not claim the five percent exemption provided in the Williams Act for offerors.[109] Explaining that a broad application of section 10(b) and rule 10b-5 had been previously adopted by the courts,[110] the court found that Chiarella had fair notice, prior to acting, that his acts were in violation

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[99] See authorities cited in note 94 *supra*.

[100] 536 F.2d 1388 (2d Cir. 1976).

[101] *Id.* at 1397.

[102] United States v. Charnay, 537 F.2d 341, 351-52 (9th Cir. 1976).

[103] *Id.*; United States v. Dixon, 536 F.2d 1388, 1397 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971).

[104] United States v. Chiarella, 588 F.2d 1358, 1365 (2d Cir. 1978) (construing *Texas Gulf Sulphur), cert. granted*, 99 S. Ct. 2158 (1979); *see* 15 U.S.C. § 78j (1976); 17 C.F.R. 240.10b-5 (1978). See also notes 28 through 33 *supra*.

[105] 588 F.2d at 1364.

[106] *Id.* at 1364-65; *see In re* Investors Management Co., 44 S.E.C. 633 (1971); *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

[107] 588 F.2d at 1365-66. The court relied on Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), for the "regular access to market information" phrase. 588 F.2d at 1366.

[108] 588 F.2d at 1366. The court distinguished Chiarella's position from that of the offeror in two ways. First, the offeror had no regular access to non-public market information, as did Chiarella. *Id.* at 1366. Secondly, the offerors assumed a risk that their analysis might be faulty or that the offer would fail, whereas Chiarella assumed no risk at all. *Id.* at 1367.

[109] *Id.* at 1367. The minority also pointed out that Chiarella had defrauded the offerors by converting their confidential information to his private use. *Id.* at 1367-68. With this factor in mind, the court was reluctant to allow Chiarella to hide behind an act wrongful under common law in order to avoid a securities violation as well. *Id.* at 1368.

[110] *Id.* at 1369. The court relied heavily on the expansive *Texas Gulf Sulphur* language for the statement of an inclusive rule. *Id.* See notes 44 through 47 and accompanying text *supra*.

of the law.[111] The court further ruled that proof of a specific intent to defraud was unnecessary[112] and that intent was sufficiently proven by a showing that Chiarella knew he was doing something wrong,[113] a fact he admitted.[114] The court found that since these admittedly wrong acts were in fact violations of the law,[115] the proof was sufficient to sustain the criminal conviction.[116]

In an eloquent dissent,[117] Judge Meskill supported the traditional application of the disclosure rule under which Chiarella, having no special relationship to the issuer of the securities traded, was not required to "disclose or abstain"[118] and, therefore, was not liable for nondisclosure.[119] Subdividing this argument, Judge Meskill contended that since Chiarella had no fiduciary relationship with the persons from whom he bought,[120] he owed them no duty of disclosure.[121] Furthermore, Judge Meskill argued that although the tender offerors were the only persons harmed by the breach of fiduciary duty,[122] such wrongdoing was not actionable under rule 10b-5;[123] Chiarella had therefore not violated the law with respect to the offerors.[124] The major barrier to a criminal conviction, according to Judge Meskill, was the fact that no prior interpretation of insider liability included Chiarella;[125] he thus had no prior notice, as required by due process,[126] that his acts were criminal and his

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[111] 588 F.2d at 1369. In rejecting Chiarella's claim that his conviction was based on a novel interpretation of rule 10b-5, the court reasoned that its decision was no more than a logical extension of the *Texas Gulf Sulphur* rule. *Id.* See notes 44 through 47 and 106 through 108 and accompanying text *supra.*

[112] 588 F.2d at 1370-71. See notes 92 through 95 *supra.*

[113] 588 F.2d at 1370-71. The majority relied on the *Dixon* criminal intent test, which requires only that the defendant know he is doing a wrongful act and deliberately follow through to commit the act. *Id.* See notes 100 & 101 and accompanying text *supra.*

[114] 588 F.2d at 1371. Chiarella had admitted at trial that he knew his actions were "wrong" and "against the SEC." *Id.*

[115] *Id.* at 1371.

[116] *Id.* at 1370-71.

[117] *Id.* at 1373 (Meskill, J., dissenting).

[118] *Id.* at 1373-74.

[119] *Id.* at 1373.

[120] *Id.* at 1375. Judge Meskill took issue with the majority's reliance on Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), arguing that "regular access to market information" would not, by itself, have established a duty of disclosure. 588 F.2d at 1375. See notes 58 through 61 and accompanying text *supra.*

[121] 588 F.2d at 1375.

[122] *Id.*

[123] *Id.* (citing Santa Fe Industries v. Green, 430 U.S. 462, 472 (1977)).

[124] 588 F.2d at 1375.

[125] *Id.* at 1377.

[126] *Id.* at 1376-77.

conviction could not, therefore, be sustained.[127] Judge Meskill also pointed out that, as a policy matter, since the United States Supreme Court has clearly expressed a desire to limit the expansion of rule 10b-5 in civil actions,[128] the court should be even more reluctant to construe the rule flexibly in a criminal case.[129]

Chiarella represents a major expansion of securities liability. Not since *Cady, Roberts* has any court taken such initiative in bringing the insider trading rule more in line with the original congressional desire to insure "fair and honest markets."[130] Despite the expansive language to the contrary in cases such as *Texas Gulf Sulphur*,[131] no court had previously discarded the requirement of a finding of some sort of special relationship.[132] Although the test had been loosened over the years,[133] the retention of the "any relationship" requirement prevents full acceptance of the fairness doctrine and its correlative requirement of equal access to material information. Furthermore, no major case had yet imposed liability for the nondisclosure of market information;[134] sanctions had been imposed only for the nondisclosure of "inside information."[135] *Chiarella* removes both these barriers. The information Chiarella had access to was clearly not "inside information."[136] Moreover, Chiarella had no special relationship either with the persons who sold to him or with the corporations in whose securities he traded. In fact, his relationships with the offering corporations were so tangential and vicarious that, for all practical purposes, he had no relationship with any relevant party. Thus, *Chiarella* discards much of the restrictive analysis through which courts had previously struggled to reach equitable results.[137]

Nevertheless, the instant case will not greatly reduce the mass of rule 10b-5 litigation. Like *Cady, Roberts, Chiarella* will create problems of its own.[138] The major problem lies in the forthcoming interpretation

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[127] *Id.* at 1378.

[128] *Id.* at 1377. See cases cited in note 14 *supra.*

[129] 588 F.2d at 1377.

[130] *See* 15 U.S.C. § 78(b) (1976).

[131] See notes 43 through 47 and accompanying text *supra.*

[132] This point was made by Judge Meskill. See notes 118 through 127 and accompanying text *supra.*

[133] See notes 24 through 74 and accompanying text *supra.*

[134] Although the SEC has made several such rulings and a district court reached the question in Courtland v. Walston & Co., Inc., 340 F. Supp. 1076 (S.D.N.Y. 1972), no court of appeals had made such a ruling. See notes 64 through 68 *supra.*

[135] See notes 30 through 40 and accompanying text *supra.*

[136] See text accompanying notes 78 through 82 *supra.*

[137] See note 58 and accompanying text *supra.*

[138] See note 41 *supra.*

and refinement of the "regular access to market information" test. For example, the term "regular" will almost inevitably be used to limit or confuse the applicability of the rule. If "regular" is subsequently defined as an event's occurring more than once, ordinary tippees, as in *Cady, Roberts,* might escape liability. In addition, some litigation will be required before a working definition of the relatively new concept of "market information" can be reached. Furthermore, because "market information" encompasses much more than inside information, *Chiarella* may be used to impose sanctions on persons engaging in practices not previously thought suspect.[139]

In addition, *Chiarella* may be indicative of the SEC's plans for the future. That the SEC would recommend criminal prosecution of one in Chiarella's position might well be interpreted as notice of a more activist Commission.[140] Whatever the correctness of this speculation,[141] *Chiarella* is certainly an addition to the legal arsenal of those who want to equalize the trading positions of all investors.

Guy T. Gillespie, III

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[139] See note 82 and accompanying text *supra.* Practices such as warehousing and recommendations by analysists could, under *Chiarella,* be held violative of rule 10b-5.

[140] This is the view taken by Judge Meskill, who would rather see the SEC accomplish its goals by new rulemaking rather than through criminal prosecution. 588 F.2d at 1376 (Meskill, J., dissenting).

[141] It must be kept in mind that, at the time of this printing, the United States Supreme Court has granted certiorari in this case. Given the restrictive interpretations of rule 10b-5 by the Court in recent years, it would come as no surprise if the Court were to reverse this case. In this event, the substantive law developed in *Chiarella* would remain in effect only if the reversal were based on some procedural ground, such as the fair notice element of due process.

Criminal Procedure—Title III—Courts Have Statutory Power To Authorize Forcible and Surreptitious Entry By Law Enforcement Officials To Install Electronic Surveillance Devices

Petitioner was charged with conspiracy to steal goods being shipped in interstate commerce.[1] He moved at trial to suppress[2] evidence gathered by electronic surveillance on the ground that the federal court order authorizing the surveillance[3] violated Title III[4] of the Omnibus Crime Control and Safe Streets Act of 1968.[5] The order did not explicitly authorize entry of petitioner's office.[6] Nonetheless, the agents acting under

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[1] Larry Dalia and others were indicted on November 6, 1975, in a five-count indictment charging them with (1) conspiracy to transport, receive, and possess stolen goods in violation of 18 U.S.C. §§ 2, 2314, 2115, and 659 (1976); (2) conspiracy to obstruct interstate commerce in violation of *id.* § 1951(b)(1); (3) transportation of stolen goods; (4) receiving stolen goods; and (5) possession of stolen goods. Dalia v. United States, 99 S. Ct. 1682, 1687 n.5 (1979).

[2] 18 U.S.C. § 2518(10)(a) (1976) (permitting motions to suppress evidence derived from unlawfully intercepted wire or oral communications).

[3] The district court authorized a wiretap on two telephones in Dalia's business office for a period of twenty days. At the end of the twenty-day period covered by the initial order, government officers requested an extension of the authorization and asked the court to allow them to intercept all oral conversations taking place in Dalia's office, including those not transmitted by telephone. The court granted the extension for a period not exceeding twenty days. 99 S. Ct. at 1685-86.

[4] Dalia also claimed that Title III was unconstitutional under the fourth amendment, *id.* at 1688, and, alternatively, that intercept orders must contain explicit approval of covert entries for the installation of electronic bugging devices. *Id.* at 1692. The statute's constitutionality has been upheld repeatedly. See note 43 and accompanying text *infra.* Prior to the instant case, however, the Courts of Appeals were split on the issue of whether the authority granted by Title III was properly implemented where the court that approved the use of bugs did not explicitly authorize, either in the intercept order or in a separate order, secret break-ins to install, repair and remove them. Of those circuits that addressed the issue, a majority favored explicit authorization. *See* United States v. Finazzo, 583 F.2d 837, 850 (6th Cir. 1978) (concurring opinion) (surreptitious entry to install electronic listening devices must be expressly approved in the court order authorizing the interception); Application of United States, 563 F.2d 637, 644 (4th Cir. 1977) (same); United States v. Ford, 553 F.2d 146, 154 (D.C. Cir. 1977) (same); United States v. Agrusa, 541 F.2d 690, 696 n.13 (8th Cir. 1976) (express court authorization to break and enter recommended as proper procedure). *But see* United States v. Scafidi, 564 F.2d 633, 639-40 (2d Cir. 1977) (orders granting authorization to bug private premises implied approval for secret entry), *cert. denied,* 436 U.S. 903 (1978).

[5] Federal Wiretap Act of 1968, Title III, 18 U.S.C. §§ 2510, 2520 (1976).

[6] The order provided in part that

> this authorization to intercept oral and wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, or in any event,

it forcibly and surreptitiously entered the premises where they installed an electronic surveillance device that they later removed. The trial court denied petitioner's motion to suppress evidence obtained through the interception of conversations by means of the device[7] and petitioner was convicted. The Court of Appeals for the Third Circuit affirmed the conviction.[8] On appeal to the Supreme Court of the United States, *held*, affirmed. Courts have the power under Title III to authorize law enforcement officials to install electronic surveillance devices in private premises by means of forcible and surreptitious entry. *Dalia v. United States*, 99 S. Ct. 1682 (1979).

Initially, the use of electronic surveillance by law enforcement officials was not viewed as an infringement on privacy protected by the fourth amendment,[9] which prohibits unreasonable searches and seizures.[10] The Supreme Court in *Olmstead v. United States*[11] ruled that such privacy must be intimately linked with tangible property to be protected by the fourth amendment.[12] By a five to four vote and over the vigorous dissents of Justices Brandeis[13] and Holmes,[14] the Court

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at the end of twenty (20) days from the date of this Order.
99 S. Ct. at 1686 n.4.

[7] The trial court ruled that a covert entry to install bugging devices was not unlawful merely because the court issuing the Title III surveillance warrant did not explicitly authorize such an entry. United States v. Dalia, 426 F. Supp. 862, 866 (D.N.J. 1977), *aff'd*, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979).

[8] United States v. Dalia, 575 F.2d 1344, 1347 (3d Cir. 1978).

[9] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[10] Originally written as a reaction against general warrants and writs of assistance used by the British in the American colonies, the fourth amendment to the Constitution echoed early English attempts to obtain similar protection from indiscriminate governmental intrusions. *See* Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1965) (established criteria for the issuance of search warrants). *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

[11] 277 U.S. 438 (1928).

[12] *Id.* at 465. Fourth amendment questions did not figure prominently in early state court decisions involving electronic eavesdropping because the majority of states had rejected the federal exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914) (evidence obtained unconstitutionally held inadmissible in federal courts), and were adhering to the common law rule that evidence was admissible notwithstanding the methods used to obtain it. 52 MINN. L. REV. 541, 541 n.5 (1967).

[13] Justice Brandeis, joined by Justices Stone and Butler, advocated a flexible interpretation of the fourth amendment that would take into account technological innovations in methods of obtaining evidence: "The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can

sustained convictions based on evidence obtained from the tapping of defendants' telephone conversations.[15] In so doing, the Court held that the warrantless tapping of telephone wires and the use of the intercepted messages did not constitute an unreasonable search and seizure under the fourth amendment, there being no trespass into constitutionally protected areas[16] and no seizure of anything similar to the obviously tangible items listed in the amendment itself.[17] This trespass theory of fourth amendment analysis, with its focus on tangible property interests, limited the scope of the amendment's protection to those situations in which the surveillance technique involved a physical intrusion into private premises.[18] The *Olmstead* Court did note, however, that use of wiretap evidence at criminal trials could be regulated by Congress.[19]

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reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home." *Id.* at 474 (Brandeis, J., dissenting). Justice Brandeis argued that conversations were protected by the fourth amendment because the makers of the constitution conferred "the right to be let alone" and that, "[t]o protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Id.* at 478; *cf.* Boyd v. United States, 116 U.S. 616 (1886) (unreasonable searches and seizures not by definition limited to actual entry upon premises within the meaning of the fourth amendment). *See also* 4 HARV. L. REV. 193 (1890) (coauthored by Justice Brandeis, defines individual's right of privacy as including the right "to be let alone").

[14] Justice Holmes declared wiretapping a "dirty business," and concluded: "We have to choose, and for my part I think it is a less evil that some criminals should escape than the government should play an ignoble part." 277 U.S. at 470 (Holmes, J., dissenting).

[15] *Id.* at 469. For a detailed examination of the *Olmstead* case—from first trial to Supreme Court—see W. MURPHY, WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS (1967).

[16] 277 U.S. at 463-64; *cf.* Lopez v. United States, 373 U.S. 427, 438-39 (1963) (use of hidden recorder by a government agent in conversation with suspect did not violate fourth amendment); On Lee v. United States, 343 U.S. 747, 751-52 (1952) (transmitting conversations of a government informant wearing an electronic device with an antenna to another agent with a receiving set did not constitute trespass within purview of fourth amendment).

[17] The amendment specifically lists "persons, houses, papers, and effects" as items protected against "unreasonable searches and seizures." U.S. CONST. amend. IV. See note 9 *supra.*

[18] *Compare* Silverman v. United States, 365 U.S. 505, 510 (1961) ("spike mike" inserted into a party wall, making contact with the heating duct of defendant's home, held to be an illegal search) *with* Goldman v. United States, 316 U.S. 129, 134-35 (1942) (detectaphone placed against a wall of a private office involved no trespass and thus no fourth amendment violation).

[19] 277 U.S. at 465. Responding to this call for legislation, Congress passed the Federal Communications Act of 1934, § 605 of which proscribed the unauthorized interception and divulgence of communications transmitted over telephone or telegraph. Pub. L. No. 73-652, 48 Stat. 1103, *as amended by* Federal Wiretap Act of 1968, Pub. L. No. 90-351, 82 Stat. 223 (1968) (codified at 47 U.S.C. § 605 (1976)). The Act provides, in pertinent part, that "no person not being authorized by the sender shall intercept any communica-

Although the physical trespass theory of *Olmstead* remained for many years the standard for applying the fourth amendment to electronic surveillance,[20] privacy gradually replaced property as the principal object of fourth amendment protection.[21] Thus, the physical trespass doctrine yielded eventually to an "expectation of privacy" test[22] for

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tion and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." *Id.* Soon after enactment of the statute the Supreme Court held in Nardone v. United States, 302 U.S. 379 (1937) that evidence obtained by wiretapping in violation of § 605 was inadmissible in federal courts. *Id.* at 381. In a second case, Nardone v. United States, 308 U.S. 338 (1939), the Supreme Court interpreted § 605 as prohibiting evidence derived from information gained by wiretapping, *id.* at 340, and in the same year the Court held that § 605 prohibited the interception and divulgence of intrastate as well as interstate communications. Weiss v. United States, 308 U.S. 321, 329 (1939). Subsequently, the Court ruled in Goldstein v. United States, 316 U.S. 114 (1942), that only a party to a tapped conversation had standing to object to the admissibility of evidence so obtained, *id.* at 120, and in Rathbun v. United States, 355 U.S. 107 (1957), the Court found no violation of the statute when police officers listened to a telephone conversation from an extension with the permission of one party. *Id.* at 110. Finally, the Supreme Court held that although it was a federal crime for state officers to divulge wiretapping evidence, § 605 did not render such evidence inadmissible in state courts. Schwartz v. Texas, 344 U.S. 199, 201 (1952). The Court did, however, sustain the ban on use of such evidence in federal courts, even when the evidence had been obtained by state rather than federal officers. Benanti v. United States, 355 U.S. 96, 101 (1957). In 1968, two days before enactment of Title III, the *Schwartz* decision was explicitly overruled by Lee v. Florida, 392 U.S. 378, 385 (1968). By that time the *Weeks* exclusionary rule, see note 12 *supra,* had been extended to state proceedings. Mapp v. Ohio, 367 U.S. 643, 660 (1961). *See generally* S. DASH, R. SCHWARTZ, & R. KNOWLTON, THE EAVESDROPPERS 386-406 (1959).

[20] See note 18 *supra.*

[21] *See* Warden v. Hayden, 387 U.S. 294, 304 (1967) (privacy acknowledged as principle object of fourth amendment protection); Jones v. United States, 362 U.S. 257, 266 (1959) (constitutional right to be free from unreasonable searches and seizures dissociated from property rights developed and refined by common law).

The *Olmstead* rationale had been eroded by Supreme Court decisions in cases the facts of which the Court apparently found constitutionally repugnant. *See* Silverman v. United States, 365 U.S. 505 (1961) (microphone driven into heating duct through a party wall of adjoining home held an invasion of fourth amendment rights); Irvine v. California, 347 U.S. 128, 132 (1954) (officers breaking into home to install eavesdropping device over which conversations were intercepted for over a month held a violation of "fundamental principles declared by the fourth amendment"); On Lee v. United States, 343 U.S. 747, 765 (1952) ("In applying the exclusionary rule of Weeks v. United States . . . we are primarily concerned with where and how the evidence is seized rather than what the evidence is.") (Burton, J., dissenting).

[22] Katz v. United States, 389 U.S. 347, 353 (1967) (fourth amendment provides protection against unreasonable invasions of privacy). The interest which the Court sought to protect has been characterized as a citizen's "reasonable expectation of privacy," a phrase derived from Justice Harlan's concurring opinion in *Katz. Id.* at 360 (Harlan, J., concurring); *see* Comment, *The Reasonable Expectation of Privacy—Katz v. United States, a Postscriptum,* 9 IND. L. REV. 468 (1976); Note, *From Private Places to Personal*

determining the constitutionality of methods of electronic eavesdropping and the admissibility of evidence obtained thereby. In *Katz v. United States*[23] the Supreme Court applied the limitations of the fourth amendment[24] to the seizure of intangible conversations,[25] ruling that interceptions of private oral communications constituted searches[26] subject to the fourth amendment procedure of antecedent justification before a magistrate.[27] While refusing to translate the fourth amendment into a general constitutional right to privacy,[28] the Court emphasized that people, not places, were entitled to the protections of the amendment.[29] Thus, the trespass doctrine of *Olmstead* was expressly rejected.

In *Berger v. New York*,[30] a case decided in the same year as *Katz*, the Supreme Court examined the constitutionality under the fourth amendment of a state's attempt to authorize trespassory electronic searches and seizures. Pursuant to a New York statute[31] permitting the use of electronic eavesdropping devices, police obtained a judicial order

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Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U.L. REV. 968, 982-86 (1968).

[23] 389 U.S. 347 (1967).

[24] See note 9 *supra*.

[25] 389 U.S. at 353; *cf.* Wong Sun v. United States, 371 U.S. 471, 484 (1963) (fourth amendment held to protect against the overhearing of verbal statements incident to an unlawful arrest).

[26] 389 U.S. at 353. *Katz* involved a challenge to the admissibility of evidence obtained with the aid of an eavesdropping device attached to the top of a telephone booth by federal agents. No warrant had been issued authorizing use of the device. *Id.*; *see* Osborn v. United States, 385 U.S. 323, 330 n.9 (1966) (dictum) (warrants should be made a precondition of lawful electronic surveillance); Lopez v. United States, 373 U.S. 427, 459-64 (1963) (Brennan, J., dissenting) (warrants should be required for all use of electronic surveillance).

[27] 389 U.S. at 354-57. Dissenting in *Katz*, Justice Black stated: "Yet the Court's interpretation would have the [Fourth] Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one 'describe' a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future?" *Id.* at 365. Justice Black maintained that *Olmstead* was decided on the basis of the inapplicability of the fourth amendment to eavesdropping generally. *Id.* at 367-69. See notes 13 through 18 and accompanying text *supra*.

[28] 389 U.S. at 350.

[29] *Id.* at 351.

[30] 388 U.S. 41 (1967).

[31] N.Y. CODE CRIM. PROC. LAW § 813-a (McKinney 1968) (repealed 1968). The statute authorized the issuance of an "ex parte order for eavesdropping" upon "oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department." The oath had to state that there was reasonable ground to believe that evidence of a crime could be obtained, particularly describing the person or persons whose communications were to be overheard. 388 U.S. at 43. The order itself had to specify the duration of the eavesdrop, which could not exceed two months unless extended. *Id.*

authorizing them to tap the offices of two suspects.[32] Information secured from the taps led to the conviction of the defendant who then appealed on the ground that the statute authorized trespassory invasion into a constitutionally protected area.[33] In overturning the conviction, the Supreme Court struck down New York's electronic surveillance statute because on its face the statute permitted the seizure of conversations without the narrow procedures the Court found to be required by the fourth amendment for the issuance of a warrant.[34] Specifically, the Court found the statutory warrant requirements of particularity as to crime committed, place to be searched, person or things to be seized,[35] duration of surveillance[36] and notice to be constitutionally deficient.[37] In reaching this result, the Court applied standards used to test the constitutionality of searches conducted pursuant to warrants for tangible objects, thus providing guidelines for future legislation[38] in the area of electronic search and seizure.

Responding to the decisions rendered in *Katz* and *Berger*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[39] which not only prohibited any individual's making an unauthor-

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[32] 388 U.S. at 44-45. Three "bugs" were involved in this case. The first was used to record a conversation between one Pansini and an employee of the state liquor authority. With his consent, a device was placed on Pansini for use during a meeting held for the purpose of obtaining a liquor license. The intercepted conversation convinced police to seek an order authorizing them to plant a bug in an attorney's office. Information obtained from this second device led to another man, Harry Steiman. A third order was obtained authorizing the bugging of Steiman's office, where evidence of conspiracy to bribe the Chairman of the New York State Liquor Authority was obtained against the defendant. *Id.*

[33] *Id.* at 43. See note 16 and accompanying text *supra.*

[34] 388 U.S. at 54.

[35] *Id.* at 55-56.

[36] *Id.* at 59-60. See note 31 *supra.*

[37] 388 U.S. at 60. The practical effect of requiring that notice be given to a party under surveillance is the destruction of the usefulness of electronic search and seizure. Thus, the notice requirement established in the *Berger* decision could be interpreted as a pretext for requiring that law enforcement officials justify a lack of notice. *See* 3 VAL. U.L. REV. 89, 91 (1978); 52 MINN. L. REV. 541, 552 (1967).

[38] The New York legislature, since the *Berger* decision, has passed legislation explicitly providing for inclusion of an entry authorization in eavesdropping warrants. N.Y. CODE CRIM. PROC. LAW § 700.30 (McKinney 1971) provides that an eavesdropping warrant must contain "an express authorization to make secret entry upon a private place or premises to install an eavesdropping device, if such entry is necessary to execute the warrant." *Id.*

[39] 18 U.S.C. §§ 2510-2520 (1976). Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 187, *as amended by* Act of January 2, 1972, Pub. L. No. 91-644, 84 Stat. 1891 (amending § 2516); Act of October 15, 1970, Pub. L. No. 91-452, 84 Stat. 654 (amending §§ 2511, 2518 and 2520). *See also* Blakey and Hancock, *A Proposed Electronic Surveillance Control Act,* 43 NOTRE DAME LAWYER 657 (1968). Professor Blakey is acknowledged to be the primary

ized interception or disclosure of any wire or oral communications,[40] but also imposed criminal[41] and civil[42] penalties for such actions.[43] Although

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draftsman of Title III. *See* United States v. Giordano, 416 U.S. 505, 517 n.7 (1974).

Prior to the enactment of Title III, there was no comprehensive federal statute protecting the privacy of oral communications or permitting the circumscribed use of electronic eavesdropping by law enforcement officials. "Electronic eavesdropping" refers to both "wiretapping," the interception of telephone conversations, and "bugging," the interception of oral communications not transmitted by wire which typically requires surreptitious entry into private premises either by force or by ruse. *See* NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 43-44 (1976).

The first federal legislation regulating wiretapping was passed in 1918 as part of the World War I national security program, but, designed to safeguard government secrets rather than communicative privacy, it expired at the end of the war. It provided, in part:

> That whoever during the period of governmental operation of the telephone and telegraph systems of the United States by the Postmaster General . . . shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or willfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled to receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both.

Act of Oct. 29, 1918, ch. 197, § 1, 40 Stat. 1017 (1918). Bills introduced in Congress in 1929 and 1931 to prohibit wiretapping were never enacted. *See* NATIONAL WIRETAP COMMISSION, *supra* at 33-36.

Statutes prohibiting or regulating wiretapping had been enacted in many states long before the federal government became involved in this area. For a brief discussion of the history of electronic surveillance in America prior to 1960, see S. DASH, R. SCHWARTZ, & R. KNOWLTON, *supra* note 19, at 23-34 (1959).

For citations of the state statutes in existence in 1928, see Olmstead v. United States, 277 U.S. 438, 479 n.13 (1928). The Mississippi statute then in existence is presently codified at MISS. CODE ANN. § 97-25-49 (1972), and provides:

> A person who, either:
>
> (a) Wrongfully obtains, or attempts to obtain, any knowledge of a private telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company; or
>
> (b) Being such clerk, operator, messenger, or other employee, uses, or suffers to be used, or willfully divulges to any one but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof; or willfully fails, neglects, or refuses duly to transmit or deliver the same;
>
> Shall be punished by a fine of not more than two hundred dollars, or by imprisonment in the county jail not exceeding three months, or both.

See generally S. DASH, R. SCHWARTZ, & R. KNOWLTON, *supra* note 19, at 406-23.

[40] 18 U.S.C. § 2511 (1976).

[41] *Id.* § 2511(1).

[42] *Id.* § 2520.

the statute set out strict requirements for judicial authorization,[44] it did not provide rules governing the execution of surveillance orders by police. Inasmuch as the installation of eavesdropping devices frequently requires a surreptitious breaking and entry by law enforcement personnel,[45] congressional silence on the subject has created confusion about the propriety of court orders purporting to authorize such clandestine intrusions.[46]

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[43] The statute's constitutionality under the fourth amendment has been upheld in nine circuits, *see* United States v. Turner, 528 F.2d 143, 158-59 (9th Cir. 1975) (citing cases from nine circuits in which Title III was found constitutional under the fourth amendment), and by the Supreme Court, *see, e.g.*, United States v. United States District Court, 407 U.S. 297, 302 (1972) (noting that Title III was drawn to meet the constitutional requirements for electronic surveillance established by the Court in the *Katz* and *Berger* decisions). See notes 23 through 38 and accompanying text *supra*.

[44] *E.g.*, 18 U.S.C. § 2518(3) & (4) (1976) provide:

> (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—
>
> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
>
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> (a) the identity of the person, if known, whose communications are to be intercepted;
>
> (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
>
> (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

[45] *See* NATIONAL WIRETAP COMMISSION, *supra* note 39, at 43-44.

[46] *See* United States v. Ford, 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd*, 553 F.2d 145 (D.C. Cir. 1977) (Congress must be taken to have granted or impliedly recognized the general power of a court to authorize a covert and possibly otherwise illegal entry to place a "bug"); *cf.* United States v. Illinois Bell Tel. Co., 531 F.2d 809, 814 (7th Cir. 1976)

This issue was squarely presented in the Eighth Circuit case of *United States v. Agrusa.*[47] In *Agrusa,* a district judge's order authorized federal agents to intercept wire and oral communications and to make surreptitious and, if necessary, forcible entry into the appellant's business any time of day or night to install and subsequently remove an eavesdropping device.[48] The appellant challenged the admissibility into evidence of transcripts of intercepted conversations on the ground that the portion of the order authorizing the surreptitious and forcible entry was neither statutorily authorized nor constitutionally permissible.[49] The *Agrusa* court rejected both argumentals, holding that a court may expressly authorize governmental agents forcibly and without prior notice to break into vacant business premises for the purpose of installing eavesdropping devices, provided the court order was issued in compliance with Title III.[50] In so holding the *Agrusa* court integrated two previously distinct areas of constitutional law, one pertaining to unannounced entries[51] and the other to electronic surveillance.[52] According to standards developed by the Supreme Court for testing the constitutionality of breaking and entering without prior notice,[53] a law enforcement officer must identify both himself and his purpose before forcibly entering private premises[54] unless his failure to do so is

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(omission of any reference in Title III to a judicial power to compel communication carriers to assist police construed as meaning that Congress presumed such power existed in courts). *But cf.* Application of United States for Relief, 427 F.2d 639, 644 (9th Cir. 1970) (lack of reference in Title III to judicial power to require communication carriers to assist government in performance of intercept order considered proof of lack of such power).

[47] 541 F.2d 690 (8th Cir. 1970), *cert. denied,* 429 U.S. 1085 (1977).

[48] 541 F.2d at 693. The portion of the order authorizing the government to enter appellant's business premises provided:

> [T]o make secret and, if necessary, forcible entry any time of day or night which is least likely to jeopardize the security of this investigation, upon the premises . . . in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises.

Id.

[49] *Id.* Other allegations of error were based upon alleged noncompliance with procedural requirements of Title III. *Id.*

[50] *Id.* at 701. See note 43 *supra.*

[51] *See generally* Blakey, *The Rule of Announcement And Unlawful Entry: Miller v. United States and Ker v. California,* 112 U. PA. L. REV. 499, 500-08 (1964).

[52] *See generally* 24 WAYNE L. REV. 135, 141 (1977).

[53] *See* Sabbath v. United States, 391 U.S. 585, 590 (1968) (entry into apartment through unlocked door held to be forcible even though no physical force was used); Ker v. California, 374 U.S. 23, 40 (1963) (unannounced, forcible entry justified by possibility of destruction of evidence); Miller v. United States, 357 U.S. 301, 313-14 (1958) (police required to give notice of authority and purpose before breaking and entering).

[54] This common law tradition is codified at 18 U.S.C. § 3109 (1976), which provides:

justified by exigent circumstances.[55] Among those circumstances excusing prior notice is the possible destruction of evidence.[56]

In the context of electronic surveillance, any requirement of notice prior to the execution of a surveillance order would be tantamount to the destruction of evidence.[57] Thus, the *Agrusa* court concluded that forcible and surreptitious intrusions authorized by surveillance orders did not, because of the presence of exigent circumstances, violate constitutional protections.[58] The *Agrusa* court did not, however, consider whether forcible and surreptitious entries for the purpose of planting surveillance devices may nevertheless violate Title III. That question was addressed in *United States v. Santora.*[59] As in *Agrusa,* a federal court order had authorized governmental agents to intercept communications at appellant's place of business, and to enter the premises forcibly and surreptitiously to install and subsequently remove electronic surveillance devices.[60] The appellant moved to suppress evidence thus gathered, asserting the invalidity of that portion of the interception order purporting to authorize the break-in on the ground that it violated

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> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Id. Mississippi has a similar statute which provides:

> To make an arrest an officer or private person, after notice of his office and object, if admittance is refused, may break open a window or outer or inner door of any dwelling or house in which he has reason to believe the offender may be found.

MISS. CODE ANN. § 99-3-11 (1972).

[55] *See, e.g.,* Ker v. California, 374 U.S. 23, 40 (1963) (possible destruction of evidence constitutes "exigent circumstances").

[56] *See* United States v. Mapp, 476 F.2d 67, 75 (2d Cir. 1973) (warrantless entry justified where officers heard rapid footsteps in apartment after knocking even though they failed to announce their purpose); United States v. Singleton, 439 F.2d 381, 385-86 (3d Cir. 1971) (where officers were certain that person denying entrance knew their identity and purpose, announcement of purpose and authority excused as "useless gesture"). Noncompliance with the notice requirement of 18 U.S.C. § 3109 (1976), see note 54 *supra,* is also excused when there is danger to the officers, the occupants or both, and when the premises are vacant. *See* 24 WAYNE L. REV. 135, 139-40 (1977).

[57] 541 F.2d at 698; *see* Katz v. United States, 389 U.S. 347, 355 n.16 (1967).

[58] The *Agrusa* court also addressed the applicability of 18 U.S.C. § 3109 (1976), see note 54 *supra,* and concluded that the presence of exigent circumstances, *i.e.* the possible destruction of evidence, excused noncompliance with the statute. 541 F.2d at 700-01.

[59] 583 F.2d 453 (9th Cir. 1978).

[60] The order specifically authorized governmental agents to enter appellant's business premises, "without permission of the owners, occupants, or lessees thereof and to install, maintain, and subsequently remove from said premises equipment for the interception of oral communications; and to intercept oral communications taking place within said office or within range of said equipment." *Id.* at 454.

Title III.[61] The Court of Appeals for the Ninth Circuit agreed, finding no indication in either the statutory provisions or the legislative history of Title III of a congressional intention to invest district courts with the power to authorize surreptitious entries for the purpose of installing electronic surveillance devices.[62] The *Santora* court thus concluded that no power to authorize break-ins could be implied from congressional silence on the subject,[63] and that any evidence obtained pursuant to such an authorization was the fruit of an illegal interception of communications and therefore subject to suppression.[64] Among those circuits that have considered cases involving a similar question, however, a majority has ruled that Title III implicitly grants to courts the power to authorize such entries.[65]

In the instant case the Supreme Court reasoned that since the fourth amendment does not prohibit per se a covert entry performed for

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[61] Appellant also attacked the validity of the initial interception order in its entirety, adducing alleged defects in the government's application for the order. First, he argued that the government failed to produce evidence showing that the Attorney General of the United States personally reviewed the facts prior to signing the authorization. *Id.* at 455. The court rejected this argument, holding that the basis on which the proper authorizing official gave the authorization is not subject to review. *Id.; see* United States v. Feldman, 535 F.2d 1175, 1181 (9th Cir.) (that official has properly exercised judgment called for by the statute is to be presumed), *cert. denied*, 429 U.S. 940 (1976); United States v. Turner, 528 F.2d 143, 150 (9th Cir. 1975) (statute does not expressly require such a review). *But see* United States v. Giordano, 416 U.S. 505, 571 (1974) (insuring authorization by the Attorney General or a properly designated Assistant Attorney General constitutes an important safeguard of Title III).

Secondly, appellant argued that the government failed in its initial application to make a particularized showing of the improbability of success or a high degree of danger associated with the use of alternative investigative techniques as required by 18 U.S.C. § 2518(1)(c) (1976). The court ruled that a government affidavit containing factual representations of the agents' efforts to use normal investigative procedures was a sufficiently particularized showing. 583 F.2d at 455-56. Thirdly, appellant claimed that the district court "erred in denying an evidentiary hearing" on the issue of whether an effort had been made to minimize interception of conversations unrelated to the criminal activity specified in the order, as required by 18 U.S.C. § 2518(5) (1976). The court ruled that power to order an evidentiary hearing rests within the discretion of the district court. 583 F.2d at 456.

[62] 583 F.2d at 456.

[63] *Accord,* United States v. Finazzo, 583 F.2d 837, 841 (6th Cir. 1978) (judges do not have the power under Title III to authorize breaking and entering for the purpose of installing surveillance devices).

[64] 583 F.2d at 465.

[65] United States v. Scafidi, 564 F.2d 633, 639 (2d Cir. 1977) (Congress intended to empower courts to permit such entries), *cert. denied*, 436 U.S. 903, 912 (1978); Application of United States, 563 F.2d 637, 640 (4th Cir. 1977) (Title III implicitly authorizes surreptitious entry); United States v. Ford, 414 F. Supp. 879, 883 (D.D.C. 1976) (Title III implicitly grants power to courts to authorize surreptitious and forcible entries by separate court order), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977).

the purpose of installing otherwise legal electronic surveillance equipment, such entries are constitutional if at least made pursuant to a warrant.[66] Moreover, since the legislative history of Title III and the judicial precedents established before and after its enactment[67] reflect a general approbation of surreptitious entries, Congress did intend through the statute to confer power upon the courts to authorize electronic surveillance without any limitation on the means necessary to its accomplishment.[68] Finally, the Court concluded that since the warrant clause of the fourth amendment requires only that warrants particularly describe the items to be seized, that those officials seeking warrants demonstrate probable cause to believe that the evidence sought will aid in an apprehension or conviction, and that the warrants be issued by neutral, disinterested magistrates, the fourth amendment does not require that Title III electronic surveillance orders include specific authorization to enter covertly the premises described in the orders.[69]

In dissent Justice Stevens, with whom Justices Brennan and Marshall joined, argued that since Title III was devoid of any reference to forcible and surreptitious entries as a permissible means of implementing surveillance orders, and since the statute was in all other respects explicit and exhaustive, no power to authorize break-ins could be implied from the statute's silence.[70] Furthermore, since the legislative and judicial histories of Title III were imbued with an abiding concern for the protection of privacy,[71] Congress did not intend by the statute's silence implicitly to authorize orders permitting such a breach of that protection.[72]

In a separate dissent Justice Brennan, assuming for the sake of argument that Title III did authorize covert entries,[73] argued that nevertheless the fourth amendment required governmental agents who wish to break into private premises to secure prior specific judicial authorization for the surreptitious entry[74] since breaking and entering into private

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[66] Dalia v. United States, 99 S. Ct. 1682, 1688 (1979).

[67] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1970), *cert. denied*, 429 U.S. 1085 (1977).

[68] 99 S. Ct. at 1689-92.

[69] *Id.* at 1694.

[70] *Id.* at 1697-1700 (Stevens, J., dissenting).

[71] *Id.* at 1701-04. Justice Stevens relied heavily upon the Court's decision in Irvine v. California, 347 U.S. 128 (1954) as proof of the Court's historical aversion to condoning "official trespass and burglary absent specific authorization." 99 S. Ct. at 1704. As to the relevance of *Irvine* in the debate over whether Title III empowers courts to authorize secret entries into private premises, see note 91 and accompanying text *infra*.

[72] 99 S. Ct. at 1704.

[73] *Id.* at 1694 (Brennan, J., dissenting).

[74] *Id.* at 1695.

premises for the purpose of planting bugs is tantamount to an independent search and seizure and since the practice is particularly intrusive and susceptible to abuse. In addition, since premises may be bugged through means less drastic than covert invasion, according to Justice Brennan, requiring police to secure prior approval for surreptitious entries may prevent unnecessary and improper intrusions.[75]

Responding to the manifest need for a resolution of the constitutional and statutory questions that figure so prominently in the judicial debate over Title III and the subject of electronic surveillance, the Supreme Court has in the instant case filled an important and troublesome legislative lacuna. The decision itself is undoubtedly sound, although the history and substance of Title III are susceptible to vastly differing interpretations. That Congress was extremely concerned about the potential abuses of electronic surveillance is reflected by both the meticulously drawn provisions of Title III and the extensive legislative history of the Act.[76] Notwithstanding its obvious solicitude for protection of privacy, however, Congress designed Title III to aid law enforcement agencies in combatting organized crime,[77] a fact obliquely alluded to by Justice Stevens in his dissent.[78] It is inconsistent with such a purpose to infer from the statute's silence that Congress intended to deprive law enforcement officials of an effective weapon in the fight against organized crime.[79] Furthermore, passage of the 1976 amendment to the Act[80] indicates that Congress considered the problem of implementing interception orders but found it unnecessary to prohibit explicitly the authorization of forcible and surreptitious entries.[81]

Justice Stevens emphasized the Supreme Court's unconstitutional-

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[75] *Id.* at 1696.

[76] *See* S. Rep. No. 1097, 90th Cong., 1st Sess. 238-39 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2153-63. *See also* McNamara, *The Problem of Surreptitious Entry To Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?*, 15 AM. CRIM. L.R. 1, 8 (1977).

[77] *See* U.S. CODE CONG. & AD. NEWS 2157-63 (1968); 24 WAYNE L. REV. 135, 145 (1977).

[78] 99 S. Ct. at 1704 n.33 (Stevens, J., dissenting).

[79] *See* NATIONAL WIRETAP COMMISSION, *supra* note 39, at 15.

[80] 18 U.S.C. § 2518(4) (1976) provides in pertinent part:

> An order authorizing the interception of a wire or oral communication shall, upon request of applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted.

Id.

[81] *See* NATIONAL WIRETAP COMMISSION, *supra* note 39, at 43-44.

on-its-face analysis of the New York statute in *Berger*,[82] a case involving a physical trespass for the purpose of installing a bug.[83] He ignored, however, the substantive significance of *Berger:* that a statute which corrected the constitutional deficiencies inherent in the New York statute would bring court-ordered wiretapping and bugging within the bounds of the fourth amendment. Indeed, this implicit command was subsequently obeyed by the New York legislature.[84] Moreover, the legislative debate on Title III reveals that Congress was careful to draw the statute within the scope of constitutionality outlined by the *Berger* and *Katz* decisions.[85] Although Justice Stevens noted the difference between trespassory and nontrespassory entries,[86] he attached no significance to Congress' failure to distinguish between the two in the legislative debate on Title III[87] despite the clear distinction drawn during the debate between wiretapping and bugging.[88] Clearly, Congress was less impressed with the importance of the distinction than Justice Stevens was. The term "bugging" in the context of the legislative debate was used generically, embracing both trespassory and nontrespassory methods, and cannot be interpreted as referring exclusively to the latter.[89] Additionally, Justice Stevens' reliance upon *Irvine v. California*[90] as an example of the Court's historical repugnance to covert entries is somewhat misplaced.[91] That case involved a warrantless intrusion;[92] it cannot be dispositive of the question of whether Title III, which contains carefully written provisions for the issuance of intercept orders, permits trespasses in the execution of those orders.

Nevertheless, the Court's ancillary ruling that neither Title III nor the fourth amendment requires explicit judicial approval of covert entries is less tenable both for constitutional reasons and for reasons of public policy. Constitutional objections to any scheme of electronic sur-

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[82] 99 S. Ct. at 1701 n.22 (Stevens, J., dissenting). See notes 30 through 38 *supra.*

[83] See notes 31 through 38 *supra.*

[84] See note 38 and accompanying text *supra.*

[85] *See* 114 CONG. REC. 11231, 11474 (1968). See note 43 and accompanying text *supra.*

[86] 99 S. Ct. at 1701 (Stevens, J., dissenting).

[87] *See, e.g.,* 114 CONG. REC. 12989, 14474 (1968).

[88] *Id.* at 12989 (1968).

[89] Justice Stevens suggested that opponents of Title III did not read into the bill authority to permit trespassory bugging or eavesdropping. 99 S. Ct. at 1702 (Stevens, J., dissenting). The Congressional debate, however, indicates that opponents and proponents of Title III were well aware of the methods employed by police in electronic surveillance, and simply assumed that bugging involved physical intrusions, unlike wiretapping. *See, e.g.,* 114 CONG. REC. 14734-36 (1968).

[90] 347 U.S. 128 (1954).

[91] 99 S. Ct. at 1703-04 (Stevens, J., dissenting).

[92] 347 U.S. at 132.

veillance under the fourth amendment are based generally upon the inherently indiscriminate nature of wiretapping and bugging and the necessity of conducting surveillance without prior notice to the suspect.[93] Underlying these objections is a concern for protecting an individual's paramount right to privacy. Yet, as one distinguished commentator has pointed out,[94] there is no right to enjoy privacy in the perpetration of criminal activities.[95] Privacy may be invaded constitutionally where probable cause exists to justify such an invasion.[96] Fourth amendment protection against unreasonable searches and seizures, however, consists in requiring that a neutral and detached magistrate determine the existence of probable cause.[97] In the context of electronic surveillance a judge must determine both the existence of probable cause to believe an individual is committing or has committed a particular offense,[98] and that normal investigative techniques have been tried and have failed[99] before approving an application for an electronic interception order. Since a determination of probable cause in this context requires a showing of investigative procedures previously employed, it is consistent with this requirement to insist that a judge be apprised of methods available in the future and that he specifically authorize their implementation. The particularly intrusive nature of covert entries and the possibility of executing surveillance warrants successfully without resort to trespassory invasions[100] make it desirable that discretion to decide whether circumstances warrant break-ins be reposed in a neutral magistrate.[101] Indeed, fourth amendment protection of individuals against arbitrary invasions of privacy by governmental officials would

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[93] *Cf.* Lopez v. United States, 373 U.S. 427, 463 (1963) (Brennan, J., dissenting) (electronic surveillance should be regulated by the fourth and fifth amendments just as conventional searches and seizures are).

[94] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME app., at 96 (1967) (G. Blakey, Aspects of the Evidence Gathering Process in Organized Crime Cases).

[95] *Id.*

[96] *Id.*

[97] Johnson v. United States, 333 U.S. 10, 14 (1948).

[98] 18 U.S.C. § 2518(3)(a) (1976).

[99] *Id.* § 2518(3)(c).

[100] 99 S. Ct. at 1694-96 (Brennan, J., dissenting).

[101] *See* Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967) (discretion to invade private property consistently circumscribed by a requirement that a disinterested party warrant the need to search). The details of how best to proceed with a secret entry could be left to the discretion of the executing officers. A surveillance warrant need only authorize an entry; it need not specify the precise means by which the entry is to be effected. Thus, the majority's fear of promoting "empty formalism" by requiring such an authorization appears to be groundless. 99 S. Ct. at 1695 (Brennan, J., dissenting). *See also* McNamara, *supra* note 76, at 27.

be seriously weakened by a rule requiring no specific judicial authorization in surveillance warrants to enter private homes or businesses.[102] Unfortunately, the Court's decision in the instant case has precisely that effect.

H.D. Granberry, III

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[102] The decision on this point in the instant case is contrary to the rule endorsed by the majority of circuits in similar cases. See note 4 *supra*.

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Is north a due direction?

The sewerage and water board of a major southern city appeared before a civil district court to petition for approval of a drainage plan involving a large area of land. The petition was denied, and the board appealed to the state Supreme Court.

At issue was the definition of the word "north". Was it only a direction? Or was it also the areas north of a parallel passing through the bound described and encompassing lands northeast and southeast of bound? Most of the land involved in the drainage area did not lie due north of a described avenue.

Among the authorities the Supreme Court judge checked was Words and Phrases. He was quickly directed to case law in which north had been judicially defined under differing circumstances. He found a case in point. His opinion, in this instance, was in favor of the broader definition. His decision reversed the lower court.

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